

# Restructuring the U.S. Approach To Judgments On Foreign Currency Liabilities: Building On The English Experience

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## Introduction

Recent years have seen wide fluctuations in the value of currencies on the foreign exchange markets.<sup>1</sup> As a result, those who participate in transnational business transactions now face greater risks when they become creditors on a foreign currency liability. This risk is exacerbated when the creditor must turn to U.S. courts to satisfy a foreign currency debt. Under the home currency judgment rule,<sup>2</sup> United States courts have required all judgments to be granted in U.S. currency and have not recognized that an award in a foreign currency may better serve the interests of the injured party. English courts have recently thrown off three and a half centuries of similar precedent and are now granting judgments in foreign currencies. It is time for the United States to abandon its out-dated rules on foreign currency liabilities and adopt an approach consistent with modern commercial realities.

By providing that courts may render judgments either in U.S. dollars or in foreign currency, section 823 of Tentative Draft No. 6 of the Restatement (Revised) of Foreign Relations Law of the United States

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1. Wide currency fluctuations date most recently from President Nixon's 1971 decision to allow the dollar to float against other currencies. See 7 WEEKLY COMP. PRES. DOC. 1168, 1170-71 (Aug. 15, 1971). For a general discussion of the implications of the closing of the "gold window" in 1971, see K. DAM, *THE RULES OF THE GAME* 175-210 (1982); Gold, *Symmetry as a Legal Objective of the International Monetary System*, 12 N.Y.U. J. INT'L L. & POL. 423 (1980). Governmental intervention has recently contributed to exchange rate fluctuation with the agreement, in the fall of 1985, between the U.S. and four major trading partners, to drive down the value of the U.S. dollar. See *U.S. and 4 Allies Move to Cut Value of Dollar*, N.Y. Times, Sept. 23, 1985, at A1, col. 6; *Dollar Plunges to 16-Month Low in Reaction to 5 Nations' Accord*, N.Y. Times, Sept. 24, 1985, at A1, col. 4. In addition, rapid currency exchange rate fluctuation during the period between the end of the gold standard in roughly 1914 and the beginning of the Bretton Woods System in 1945 elicited substantial scholarly comment. See *infra* note 11.

2. See *infra* notes 6-9 and accompanying text.

attempts to avoid the problematic home currency judgment rule.<sup>3</sup> However, the proposed change does not avoid the confusing and inappropriate secondary rules used to determine the exchange rate to be applied in converting a foreign currency liability to a U.S. currency judgment. By continuing to allow judgment in U.S. dollars when a foreign currency judgment would be more appropriate, the new Restatement rule fails to take this necessary second step. An acceptable rule not only must recognize that U.S. courts can give judgment in a foreign currency or its equivalent, but also must provide for judgment in the most appropriate currency, compensate the plaintiff for any post-injury loss resulting from exchange rate fluctuation, and provide for pre- and post-judgment interest at a rate appropriate to the currency of judgment.

As an alternative to section 823 of the Draft Restatement, this Article will propose a rule consistent with a proper reading of current U.S. law that better meets the exigencies of international commerce. In order to facilitate an understanding of this rule, Part I provides a brief review of the current U.S. rules and discusses the practical problem facing the transnational merchant. Part II surveys the development of the home currency judgment rule in England, along with its recent modification there. This discussion sets the stage for Part III, which outlines the misconceptions inherent in the U.S. rules. Part III also describes recent developments that serve as the basis for the creation of a better rule. Part IV then turns to the new Restatement provision and offers an alternative designed to remedy the problems left unresolved by that provision.

## I. The U.S. Legal Framework and the Practical Problem

U.S. rules dealing with judgments on liabilities stated in foreign currencies are founded on legislation as long-standing as the Currency Act of 1792<sup>4</sup> and on case law as respected as the choice-of-law jurisprudence of Justice Holmes.<sup>5</sup> However, through blind allegiance to oft-stated rules, courts and commentators have ignored the fact that neither the Currency Act nor the Holmesian analysis either requires or any longer

3. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 823 (Tent. Draft No. 6, 1985). See also RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 853 (Tent. Draft No. 5, 1984).

4. An Act Establishing a Mint, and Regulating the Coins of the United States of 1792, 1 Stat. 246, 250 (codified prior to Sept. 13, 1983, at 31 U.S.C. § 371, and after Sept. 13, 1983, at 31 U.S.C. § 5101) [hereinafter cited as Currency Act of 1792].

5. Die Deutsche Bank filiale Nurenberg v. Humphrey, 272 U.S. 517 (1926); Hicks v. Guinness, 269 U.S. 71 (1925).

## Foreign Currency Judgments

supports those rules. They have further failed to recognize the underlying principles so important to a just resolution of disputes involving foreign currency liabilities.

The home currency judgment rule requires that foreign currency claims be converted to dollar judgments and that the date of conversion is a matter for judicial determination. U.S. federal courts have dealt with the conversion date question as a conflict of laws problem. This approach was developed by Justice Holmes in two opinions which have been interpreted to provide that, if a foreign currency liability is payable or otherwise arises in the U.S., courts will apply the exchange rate existing on the date of the injury,<sup>6</sup> whereas if the same obligation arises in the foreign jurisdiction, courts will treat the obligation as arising under foreign law and apply the exchange rate existing on the date the judgment is rendered in the United States.<sup>7</sup> The rationale is that, with a liability due or arising in the United States, the innocent party should receive what he would otherwise have been entitled to on the performance date, in the case of a contract claim, or on the date of injury, in the case of a tort claim.<sup>8</sup> On the other hand, if the amount first became payable in a foreign jurisdiction, or is otherwise governed by foreign law, then there is no right of recovery in the United States until an action is filed on the claim, the date of judgment being when that right is first determinable in U.S. currency.<sup>9</sup>

Most state courts, led by New York, have tended to avoid the nuances of Justice Holmes' choice-of-law analysis by adopting a strict breach date rule.<sup>10</sup> The breach date rule provides adequate protection of reasonable economic expectations of the injured party when the currency of the forum has been the stronger currency over time; the judgment date rule provides such protection when the home currency has been the weaker currency. Neither, however, provides consistently appropriate results in all circumstances.<sup>11</sup>

6. *Hicks v. Guinness*, 269 U.S. 71 (1925).

7. *Die Deutsche Bank filiale Nurenberg v. Humphrey*, 272 U.S. 517 (1926).

8. *Hicks*, 269 U.S. at 80.

9. *Die Deutsche Bank*, 272 U.S. at 520.

10. See, e.g., *Hoppe v. Russo-Asiatic Bank*, 235 N.Y. 37, 138 N.E. 497 (1923); *Gross v. Mendel*, 225 N.Y. 633, 121 N.E. 871 (1918), *aff'g* 171 App. Div. 237, 157 N.Y.S. 357 (1916); *Kantor v. Aristo Hosiery Co.*, 248 N.Y. 630, 162 N.E. 553 (1928), *aff'g* 222 App. Div. 502, 226 N.Y.S. 582 (1928); *Sokoloff v. National City Bank of New York*, 250 N.Y. 69, 164 N.E. 745 (1928); *Parker v. Hoppe*, 257 N.Y. 333, 178 N.E. 550 (1931).

11. The articles, comments, and notes written on this issue have been numerous. The Anglo-American pieces can generally be divided into three categories:

(1) Those writers favoring a judgment date rule when applying a home currency judgment assumption. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 144 (1971); F. MANN, *THE LEGAL ASPECT OF MONEY* 315 (1st ed. 1953) (*But see* F. MANN, *THE LEGAL ASPECT OF*

Assume a U.S. seller and a West German buyer in a transaction in which the contract price of the goods is 100,000 Deutsch marks. The German buyer breaches by nonpayment, and the following exchange rates occur (based on two possible scenarios depending on which currency remains stronger):

	Strong \$ \$/DM	Strong DM \$/DM
Contract date	1/4 (\$25,000)	1/4 (\$25,000)
Breach date	1/5 (\$20,000)	1/3 (\$33,333)
Judgment date	1/6 (\$16,666)	1/2 (\$50,000)
Payment date (actual)	1/8 (\$12,500)	1/1 (\$100,000)

The amounts in parentheses represent the dollar value of the original contract price of DM 100,000, based on each of the exchange rates. Based on these figures, a plaintiff would want the exchange rate to be computed at the earliest possible date in times of a strong dollar. On the other hand, in times of a weak dollar the plaintiff would favor use of the exchange rate in effect at the latest date possible.

If U.S. courts would give judgment in the foreign currency as the currency of the contract, it would not matter whether an action on the contract was brought in the United States or in Germany. Either way, judgment would be for DM 100,000. However, if the plaintiff selects a U.S. forum and has the option to demand payment in either currency, or, as has been the consistent practice in U.S. courts, judgment is available

MONEY 325 (4th ed. 1982)) [unless otherwise indicated, all succeeding footnotes refer to the 4th edition (1982) of this treatise]; A. NUSSBAUM, *MONEY IN THE LAW NATIONAL AND INTERNATIONAL* 372 (2d ed. 1950); Evan, *Rationale of Valuation of Foreign Money Obligations*, 54 MICH. L. REV. 307 (1956); Fraenkel, *Foreign Moneys in Domestic Courts*, 35 COLUM. L. REV. 360 (1935).

(2) Those writers favoring a breach date rule. Eder, *Legal Theories of Money*, 20 CORNELL L.Q. 52 (1934); Gluck, *The Rate of Exchange in the Law of Damages*, 22 COLUM. L. REV. 217 (1922); McNair, *Rate of Exchange in English Judgments*, 37 LAW Q. REV. 38 (1921).

(3) Those writers favoring an ad hoc approach. Note, *The Need to Retreat From Inflexible Conversion Rules—An Equitable Approach to Judgment in Foreign Currency*, 22 SANTA CLARA L. REV. 871 (1982); Note, *Conversion of Judgments Measured in Foreign Currencies*, 39 WASH. & LEE L. REV. 165 (1982); Note, *Conversion Date of Foreign Money Obligations*, 65 COLUM. L. REV. 490 (1965).

One writer prefers the date suit was brought as the appropriate time to determine the relevant exchange rate. Jones, *The Spurious Judgment Day Rule for Converting Foreign Currency into Dollars When Suit is Brought Upon an Obligation Governed by Foreign Law: Deutsche Bank filiale Nuremberg v. Humphrey Revisited*, 3 INT'L LAW. 277 (1969).

Other articles on the subject include Becker, *The Currency of Judgment*, 25 AM. J. COMP. L. 152 (1977); Drake, *The Proper Rule in Fluctuating Exchanges*, 28 MICH. L. REV. 229 (1930); Drake, *The Rule, The Principle, The Standard in Fluctuating Exchange*, 25 MICH. L. REV. 860 (1927); Drake, *The Reckoning of Damages in Fluctuating Exchange*, 23 MICH. L. REV. 695 (1925); Negus, *Rate of Exchange in Reference to Foreign Debts and Debts Expressed in Foreign Currency*, 40 LAW Q. REV. 149 (1924); Rifkind, *Money as a Device for Measuring Value*, 26 COLUM. L. REV. 559 (1926).

## Foreign Currency Judgments

only in the currency of the forum, the selection of the date at which the exchange rate is computed can determine whether the plaintiff will recover \$100,000 or \$25,000 in times of a weak dollar. Given the substantial variations in exchange rates in recent years, the determination of which rate will be used has become almost as important as the initial issue of liability itself.

## II. Foreign Currency Judgments in the English Courts

“[I]f there is one thing clear in our law, it is that the claim must be made in sterling and the judgment given in sterling.”<sup>12</sup> Fifteen years after the above statement was made in *United Railways*, R.O. Wilberforce, who had been counsel for the losing party, became a Lord of Appeal. On November 5, 1975, he issued an opinion which, in effect, “says that a rule of English law taken for granted by the Court of Appeal and the House of Lords for some 350 years is no longer a rule of English Law.”<sup>13</sup> In *Miliangos v. George Frank (Textiles) Ltd.*,<sup>14</sup> by giving judgment in a foreign currency, the House of Lords departed from a long line of cases establishing that judgment must be given in sterling and that the date of breach is the proper time to compute the exchange rate when a foreign currency is involved.<sup>15</sup> The House of Lords left unclear the exact grounds upon which they based the new rule, and they clouded its subsequent application by specifically limiting the holding to judgments on a debt expressed in a foreign currency in which the money of account,

12. *Re United Railways of the Havana and Regla Warehouses*, 1961 A.C. 1007, 1068-9, listed *sub nom.* Tomkinson v. First Pennsylvania Banking and Trust Co., [1960] 2 W.L.R. 696 (H.L.) (Lord Denning M.R.).

13. *Miliangos v. George Frank (Textiles) Ltd.*, [1975] Q.B. 487, 492 (C.A.) (Bristow, J.). Judge Bristow's assumption that the rule had been unquestioned for some 350 years is borne out by the 1661 case of *Ward v. Kidswin*, a case involving foreign currency, in which it was stated:

And it was agreed by all [the judges] that in the case of foreign coin, such as Flemish, one must declare the value in English. Note that one can be charged for money as a receiver and bailee for goods or for Hamburg money, provided it is not current here; and the action is quite the same as for a box or a horse, etc.

*Ward v. Kidswin*, [1661] Lat. 77. The creditor could sue either in an ordinary action of debt for the equivalent in English money or for the foreign money in “debt in the detinet.” This latter action, now long defunct, was closely related to detinue and entitled the plaintiff to a conditional judgment for the foreign money or damages, the latter to be assessed by the jury. See *Rand v. Peck*, 79 Eng. Rep. 527 (1622).

14. 1976 A.C. 443.

15. See, e.g., *The Teh Hu*, [1970] P. 106 (C.A.); *Aruna Mills v. Dhanrajmal Gobindram*, [1968] 1 Q.B. 655; *United Railways*, 1961 A.C. 1007 (H.L.); *Re British American Continental Bank Ltd.*, *Lisser and Rosenkranz's Claim*, [1923] 1 Ch. 276 (C.A.); *Lebeaupin v. Crispin*, [1920] 2 K.B. 714; *Barry v. Van den Hurk*, [1920] 2 K.B. 709; *Di Fernando v. Simon, Smits & Co.*, [1920] 3 K.B. 409 (C.A.); *Manners v. Pearson & Son*, [1898] 1 Ch. 581, 592.

money of payment, and governing law were all foreign.<sup>16</sup> Although the principal opinions in *Miliangos* rejected a "changed circumstances" rationale for parting from the well-established home currency judgment rule,<sup>17</sup> recognition of the instability of floating exchange rates was an important factor in the decision to allow judgment in a foreign currency.<sup>18</sup> Cases following *Miliangos* have substantially expanded its narrow holding and make a review of that case, its predecessors, and its progeny fundamental to a clear understanding of current English law on foreign currency judgments.

#### A. *The Genealogy of the Sterling Judgment and Breach Date Rules*

The home currency and breach date rules were originally pronounced in *Manners v. Pearson & Son*.<sup>19</sup> A British contractor doing business in Mexico agreed to pay a Mexican businessman monthly installments in Mexican currency based on the number of cubic meters of excavation. The Mexican died in 1894. In 1897 the British firm offered to pay his estate the 19,366 Mexican dollars due in either dollars or in the English currency equivalent as of November 1897. Because the pound sterling had appreciated in value against the Mexican dollar, the representative of the deceased's estate contended that the conversion to English money should be made at the exchange rate of the dates on which the amounts had originally become payable. Lord Lindley asserted that "the courts of

16. Lord Wilberforce avoided declaring an expansive new rule by stating that he did "not think that we are called upon or would be entitled in this case, to review the whole field of the law regarding foreign currency obligations." *Miliangos*, 1976 A.C. at 467-68. He specifically limited the decision to a claim for an agreed sum stated in a foreign currency (as distinct, for example, from a claim for damages in tort or for breach of contract) and, further, to such a claim under a contract governed by the law of a foreign country and providing that both the money of account and the money of payment was that of a country other than the United Kingdom. *Id.* The distinction between money of account and money of payment is one made by Lord Denning M.R. in *Woodhouse A.C. Israel Cocoa Ltd. v. Nigerian Produce Marketing Co.*, where he stated: "The *money of account* is the currency in which an obligation is measured. It tells the debtor *how much* he has to pay. The *money of payment* is the currency in which the obligation is to be discharged. It tells the debtor *by what means* he is to pay." [1971] 2 Q.B. 23, 54 (C.A.), *aff'd*, 1972 A.C. 741 (H.L.) (emphasis in original).

17. *Miliangos*, 1976 A.C. at 465, 474-76, 497, 502-03.

18. *Id.* at 463.

19. [1898] 1 Ch. 581 (C.A.). The reason given for the home currency judgment rule was that "such order cannot be enforced by the ordinary writs of execution." *Id.* at 587. This procedural issue was resolved in *Miliangos* by acknowledging the form adopted by the Court of Appeal which would order "that the defendant do pay to the plaintiff [the sum in foreign currency] or the sterling equivalent at the time of payment." *Miliangos*, 1976 A.C. at 463. An enforcement action on the judgment would then require "an affidavit showing the rate of exchange at the date of the application [for enforcement] and give the amount of the debt converted into sterling at that date." *Schorsch Meier GmbH v. Hennin*, [1975] Q.B. 416, 426 (C.A.). The result would then be a judgment expressed in sterling in execution of the original foreign currency judgment, with the date of execution exchange rate being applied.

this country have no jurisdiction to order payment of money except in the currency of this country,"<sup>20</sup> and found that the breach date was the appropriate time for determining the exchange rate for conversion.<sup>21</sup> Subsequent cases firmly established the sterling judgment and breach date rules in English law.<sup>22</sup>

This bifurcated rule was found to apply whether the case concerned the breach of a contract by failure to pay a foreign debt,<sup>23</sup> breach of a contract other than by failure to pay a foreign debt,<sup>24</sup> or a tortious injury.<sup>25</sup> Cases generally did not draw any distinction between whether the value of sterling had risen or had fallen in relation to the foreign currency involved.<sup>26</sup> The implicit, though unadmitted, rationale for these rules was largely administrative convenience. The courts considered the chance of damages caused by currency fluctuation after the original date of injury too remote to justify compensation.<sup>27</sup> For Lord Sumner, in *S.S. Celia v. S.S. Volturno*,<sup>28</sup> the choice between currencies was analogous to the interpretation of a foreign language. If all else in the case must be interpreted to the English court as it existed at the date of injury, he reasoned, so must the amount of currency be "interpreted" into "English" at that date.<sup>29</sup>

20. *Manners v. Pearson & Son*, [1898] 1 Ch. at 587. As the parties had agreed upon the number of Mexican dollars due, it has been suggested that this part of the *Manners* decision was no more than dictum. *Miliangos*, 1976 A.C. at 493 (Lord Cross).

21. *Manners*, [1898] 1 Ch. at 587.

22. See *supra* note 15. It should be noted that even though the only clear holding of the *Manners* case results from the application of the rule requiring conversion of the foreign sum to sterling at the exchange rate existing on the date of breach (the "breach date rule"), this rule is generally considered to arise out of the rule requiring that judgment be rendered in sterling (the "sterling judgment rule"). In other words, in order for the procedural (sterling judgment) rule to be carried out, the court must select a substantive (breach date) rule to determine the applicable exchange rate. See Private International Law Foreign Money Liabilities, LAW COMMISSION WORKING PAPER No. 80 § 2.4-.5 (1981) [hereinafter cited as LAW COMMISSION WORKING PAPER].

23. See *United Railways*, 1961 A.C. 1007.

24. See *Di Fernando*, [1920] K.B. 409.

25. See *S.S. Celia v. S.S. Volturno* ("The Volturno") 1921 A.C. 544, 548 (H.L.).

26. See H. MCGREGOR, DAMAGES 479 (13th ed. 1972).

27. *Di Fernando*, [1920] K.B. at 415; *The Volturno*, 1921 A.C. at 559-60. See also H. MCGREGOR, *supra* note 26, at 478.

28. 1921 A.C. 544 (H.L.).

29. *Id.* at 558. Although *The Volturno* was a tort case, its analysis and principles have been found relevant to subsequent contract cases. Lord Sumner stated:

The agreed numbers of lire are only a part of the foreign language in which the Court is informed of the damage sustained, and, like the rest of the foreign evidence, must be translated into English. Being a part of the description and definition of the damage, this evidence as to lire must be understood with reference to the time when the damage accrues, which it is used to describe.

*Id.* at 555.

*Re United Railways of the Havana and Regla Warehouses*<sup>30</sup> was representative of the cases of this era. Although the case involved a "sum of money payable in foreign currency in a foreign country under an instrument of which the proper law is a foreign law,"<sup>31</sup> Viscount Simonds ruled that both the sterling judgment and breach date rules applied.<sup>32</sup>

The sterling judgment and breach date rules, crafted in an era when British sterling was a strong world currency, predictably became subject to criticism when sterling declined in value. In *The Teh Hu*,<sup>33</sup> Japanese salvage contractors recovered a Panamanian vessel from the mid-Pacific under a Lloyd's standard form of salvage agreement which provided for the salvors' remuneration to be fixed by arbitration in London. By the time the arbitrators made their award, sterling had been devalued. Despite the fact that one party was thinking in terms of yen and the other in dollars, the application of the breach date rule by the Court of Appeal resulted in payment in devalued pounds. As Lord Denning pointed out in dissent, "the shipowners pay less than they ought and the salvors receive less than they deserve."<sup>34</sup>

With the adherence of a Court of Appeal majority to both the sterling judgment and breach date rules, the *Teh Hu* case was indicative of the pre-*Miliangos* emphasis on rules rather than underlying principles. With sterling no longer a consistently strong currency, loyalty to the principles

30. 1961 A.C. 1007 (H.L.).

31. *Id.* at 1043.

32. Viscount Simonds' language in *United Railways* was definitive:

Admittedly, the claim must be for a sterling sum and the judgment must be in sterling. It is established by authority binding on this House that a claim for damages for breach of contract or for tort in terms of a foreign currency must be converted into sterling at the rate prevailing at the date of breach or tortious act . . . . But, it was said, doubts had been expressed whether the same rule applied where the claim arose from a failure to pay a debt expressed in terms of foreign currency, and it was urged that, on principle, the plaintiff should recover sterling at the rate prevailing at the date of judgment or, alternatively, at the date of the writ or other initiating step of the proceedings. To this it was answered that, without undue refinement the two cases, damages and foreign debt (as I will call a debt in foreign currency), could not be distinguished, that an action to recover a foreign debt was on a sound analysis nothing else than an action for recovery of damages for breach of a contract to deliver foreign currency, that there was ample authority, ancient and modern, for this proposition, and that, in any case, convenience demanded that the same rule should obtain.

*Id.* This language added to the strong barrier of precedent facing the House of Lords when *Miliangos* reached them.

33. [1970] P. 106 (C.A.).

34. [1970] P. at 123. Lord Denning's dissent has been cited as "[t]he first herald of a new judicial approach to the sterling-breach-date rule." LAW COMMISSION WORKING PAPER, *supra* note 22, § 2.7. He found the rule to be unsatisfactory in a world in which sterling was no longer the most stable currency. As a result, he expressed the fear that the confidence of merchants in the English legal system would be lost, for "once justice is denied, confidence is lost. Once confidence is lost, it is hard to restore." [1970] P. at 127.



## Foreign Currency Judgments

that generated the sterling judgment and breach date rules should have led to new rules which would adequately reflect those principles in light of changed circumstances.

### B. *Disenchantment with the Rules*

Prior to *United Railways*, English cases had all involved a rise in the value of sterling in relation to the foreign currency.<sup>35</sup> In these cases, the injured party profited from the home currency judgment and breach date rules. In *United Railways*, however, the rule was applied to a U.S. dollar contract, and the U.S. creditor was forced to accept payment in sterling converted at a rate prevalent nearly 20 years before the judgment was given.<sup>36</sup> The years between breach and judgment had seen the pound devalued from around \$4 to approximately \$2.80.<sup>37</sup> The inequitable results that the rules created when the forum currency was weak were termed “anomalous . . . artificial . . . [and] unjust,”<sup>38</sup> and “unworthy of a rational legal system.”<sup>39</sup>

Following *United Railways*, a number of departures from the sterling judgment and breach date rules crept into English law. These departures were fueled by piecemeal legislative change in direct response to serious inequitable situations. This legislation provided for judgment date conversion in cases involving the carriage of goods by air,<sup>40</sup> payment date conversion in cases involving carriage of goods by road<sup>41</sup> and rail,<sup>42</sup> and judgments in foreign currencies in cases involving the recognition and enforcement of arbitral awards<sup>43</sup> and foreign judgments.<sup>44</sup> Why Parliament chose a route of selective deviation from the established sterling

35. A. DICEY & J. MORRIS, *THE CONFLICT OF LAWS* 892 (8th ed. 1967); H. MCGREGOR, *supra* note 26, at 346. This was true of *Di Fernando*, [1920] 3 K.B. 409 (C.A.), and *The Volturno*, 1921 A.C. 544 (H.L.), the leading cases that stabilized the sterling judgment and breach date rules as to contract and tort, respectively.

36. *United Railways*, 1961 A.C. at 1009.

37. *Id.* The rule seems to have been applied, not because it was seen as fair or represented the expression of important basic principles, but simply because it was the law. This feeling was expressed by Lord Reid, who said, “[the rule] may in some cases be artificial, it may even be unjust, but it has been accepted for a long time, it is clear and certain.” *Id.* at 1048.

38. *Id.* at 1052-53 (Lord Reid).

39. F. MANN, *THE LEGAL ASPECT OF MONEY* 371 (3d ed. 1971). Other critics of the rule include A. DICEY & J. MORRIS, *supra* note 35; A. NUSSBAUM, *supra* note 11, at 370; 3 E. RABEL, *THE CONFLICT OF LAWS* 29 (2d ed. 1958); M. WOLFF, *PRIVATE INTERNATIONAL LAW* 461 (2d ed. 1945).

40. Carriage by Air Act 1961, 9 & 10 Eliz. 2, c. 27, art. 22(5), sched. I.

41. Carriage of Goods by Roads Act 1965, 13 & 14 Eliz. 2, ch. 37, art. 27(2), sched. I.

42. International Convention and Additional Protocol Concerning the Carriage of Goods by Rail 1961, art. 31(2), Brit. T.S. No. 67 (1965).

43. See *Jugoslavenska Oceanska Plovidba v. Castle Investment Co.*, [1974] Q.B. 292 (C.A.), which held that a London arbitration award made in terms of U.S. dollars was valid and enforceable without conversion into sterling. Authority for this result was found in the

judgment and breach date rules is not clear. The choice having been made, however, parties were met with differing results in analytically indistinguishable circumstances.<sup>45</sup>

In 1967, the House of Lords ruled in *Beswick v. Beswick*<sup>46</sup> that a court could order specific performance of an agreement to pay a sum of money in sterling. This raised the possibility that a similar result could be reached in a suit for an amount in a foreign currency. The time had come for a clear revision of both the procedural sterling judgment rule and the resulting substantive breach date rule.

### C. *Miliangos and its Progeny*

In *Miliangos v. George Frank (Textiles) Ltd.*,<sup>47</sup> the House of Lords reconsidered the home currency judgment and breach date rules in the context of a contract for yarn between a Swiss national and an English company. The contract was governed by Swiss law and called for payment in Swiss francs to a Swiss bank. The injured Swiss seller initially issued a writ claiming payment of the sterling equivalent of the contract price at the breach date. Between that date and the date of the hearing, however, sterling fell in value against the Swiss franc. The Swiss plaintiff then obtained leave to amend the statement of claim so as to avoid both the sterling judgment and breach date rules and to claim the amount due him in Swiss francs. The defendants did not dispute liability but contended that the plaintiff was not lawfully entitled to judgment for a sum of money expressed in a foreign currency.

The trial court in *Miliangos* followed the House of Lords directives in *United Railways* and held for the defendant, stating that an English court

Arbitration Act 1950, § 26, which enables a domestic arbitration award to be enforced "in the same manner as a judgment or order to the same effect." Section 36(I) of the Arbitration Act 1950 provides for enforcement of a foreign arbitration award in the same manner as a domestic award.

44. See *East India Trading Co. v. Carmel Exporters and Importers Ltd.*, [1952] 2 Q.B. 439 (applying Foreign Judgments (Reciprocal Enforcement) Act 1933, § 2(2) to hold that date at which foreign judgment was rendered is relevant date for conversion of foreign currency into sterling).

45. An interesting rule developed in regard to payment of a debt during the proceedings in English courts. In *Société des Hôtels Le Touquet v. Cummings*, [1922] 1 K.B. 451 (C.A.), it was held that payment out-of-court of a debt expressed in a foreign currency, subject to foreign law and payable abroad (in depreciated foreign currency), discharged the debt and required dismissal of the action. A later case arising from a similar set of facts held that the defendant cannot discharge the debt by a payment into court of an amount in foreign currency representing the reduced value of the amount in foreign currency. *Madeleine Vionnet et Cie v. Wills*, [1940] 1 K.B. 72 (C.A.).

46. 1968 A.C. 58 (H.L.), *aff'd* [1966] Ch. 538, [1966] 3 W.L.R. 396 (C.A.).

47. 1976 A.C. 443.

could grant judgment in sterling only.<sup>48</sup> The Court of Appeal reversed.<sup>49</sup> Following its own decision in *Schorsch Meier GmbH v. Hennin*<sup>50</sup> — in which the court, distinguishing *United Railways*, had held that an English court could give money judgment in a foreign currency when that currency was the currency of the contract—the court held that the principle of stare decisis compelled it to permit the foreign currency judgment.

The five speeches<sup>51</sup> that *Miliangos* occasioned in the House of Lords focused as much on whether the court had the authority and institutional capability to change an existing rule of law,<sup>52</sup> as on the rationale for the home currency judgment rule itself. In dissent, Lord Simon argued that the decision to abolish the home currency judgment rule should be made by Parliament, which was better equipped to ascertain the consequences of the change.<sup>53</sup> Nevertheless, Lord Wilberforce, relying on a declaration of the House of Lords in 1966,<sup>54</sup> which allowed deviation from principles of stare decisis to prevent injustice and to foster “the proper development of the law,”<sup>55</sup> found that the home currency judgment rule no longer served its original purpose. His speech, in which three of the remaining four Lords concurred in the result,<sup>56</sup> is a compelling indictment of the home currency judgment rule.

48. [1975] Q.B. 487.

49. *Id.*

50. [1975] Q.B. 416 (C.A.). The Court of Appeal also based its decision on article 106 of the EEC Treaty, 298 U.N.T.S. 3, which liberalizes currency payments between member states. This basis for a holding was unanimously rejected in *Miliangos*, which did not involve another EEC member country. *Miliangos*, 1976 A.C. at 465, 474-76, 497, 502-03.

51. The five speeches were made by Lord Wilberforce, Lord Simon of Glaisdale, Lord Cross of Chelsea, Lord Edmund-Davies, and Lord Fraser of Tullybelton. 1976 A.C. at 443.

52. *See id.* at 460.

53. *Id.* at 470.

54. [1966] 1 W.L.R. 1234.

55. *Id.* The Declaration of 1966 allows deviation from strict adherence to the rule of stare decisis by recognizing that “too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.” *Id.*

56. Lord Cross of Chelsea, in *Miliangos*, after arguing that *Manners* included only dicta that the sterling judgment rule was controlling, asserted that the date of judgment should be the earliest time for conversion, because until judgment is rendered, the defendant owed the plaintiff a number of Swiss francs and not English pounds. Until judgment is rendered, no liability expressed in sterling exists. *Miliangos*, 1976 A.C. at 497-98. Lord Edmund-Davies, after stating, “respectful agreement with the reasons given by . . . Lord Wilberforce,” emphasized the other rule by seeing the only real issue as the date of conversion and asserting that the outcome did not weigh heavily on the sterling judgment rule. *Id.* at 498-501. Lord Fraser of Tullybelton, after also expressing agreement with Lord Wilberforce’s reasoning, stated a preference for date-of-payment conversion before going on to say that “theory must yield to practical necessity to this extent that, if the judgment has to be enforced in this country, it must be converted before enforcement. Accordingly I agree . . . that conversion should be at the date when the court authorizes enforcement of the judgment in sterling.” *Id.* at 841. Lord Simon of Glaisdale dissented and would have dismissed the appeal. *Id.* at 815-32.

Lord Wilberforce found four fresh legal considerations, strengthened by equitable concerns that the creditor should receive full damages,<sup>57</sup> which distinguished *Miliangos* from *United Railways*. First, Lord Wilberforce argued that the basis for Lord Reid's statement in *United Railways*—that the sterling judgment rule was “primarily procedural”<sup>58</sup>—no longer held true. In times of floating currencies, foreign currency damage awards could be both more equitable and “procedurally workable.”<sup>59</sup> Second, Lord Wilberforce found that the instability of exchange rates caused by the “floating” status of the “main world currencies” meant that “the search for a formula to deal with it becomes urgent in the interest of justice.”<sup>60</sup> Third, citing London arbitration awards in foreign currencies and the accompanying trend of courts to uphold those awards,<sup>61</sup> Lord Wilberforce argued that there were no longer any “practical objections” to enforcement of such awards and that a situation in which a different rule existed for arbitration awards than for judicial actions on similar debts was intolerable.<sup>62</sup> Finally, Lord Wilberforce found that the 1974 decision in *The Halcyon the Great*,<sup>63</sup> in which the court held that the sale of a ship pursuant to compulsory liquidation of the company owning it could be made in dollars, compelled the conclusion “that the courts can easily adapt their procedure so as to give effect to foreign money claims in specie.”<sup>64</sup>

Discussion of these four legal developments was followed by three “general observations.” The first of these equitable considerations was the idea that “justice demands that the creditor should not suffer from fluctuations in the value of sterling.”<sup>65</sup> Lord Wilberforce then cited *Beswick v. Beswick*,<sup>66</sup> for the proposition that specific performance may be ordered of an agreement to pay a sum of money expressed in sterling, submitting that foreign currency is of a “more specific” character than sterling,<sup>67</sup> and, therefore, at least as suitable an object for specific performance. Finally, he relied upon the 1966 declaration of the House of Lords<sup>68</sup> which recognized the power to depart from a previous decision.

57. *Id.* at 465 (“justice demands that the creditor should not suffer from fluctuations in the value of sterling.”).

58. *United Railways*, 1961 A.C. at 1052.

59. *Miliangos*, 1976 A.C. at 463.

60. *Id.*

61. *See supra* note 43.

62. *Miliangos*, 1976 A.C. at 464.

63. [1975] 1 W.L.R. 515 (Q.B.).

64. *Miliangos*, 1976 A.C. at 464.

65. *Id.* at 465.

66. 1968 A.C. 58 (H.L.).

67. *Miliangos*, 1976 A.C. at 467.

68. [1966] 1 W.L.R. 1234 (H.L.).

## Foreign Currency Judgments

Stating that such a departure “would not involve undue practical difficulties, [and] that a new and more satisfactory rule is capable of being stated,” Lord Wilberforce declared that the *Miliangos* case “falls within the terms of the declaration.”<sup>69</sup>

The *Miliangos* decision was specifically limited to cases for collection of a debt where the money of account, the money payment, and the “proper law” of the contract were that of a foreign country.<sup>70</sup> Its application, however, could not be so confined. Lord Wilberforce’s acknowledgment that a period of floating currencies demands adjustment in procedural rules,<sup>71</sup> that the word “money” in judicial parlance must be construed in today’s world to include foreign currencies,<sup>72</sup> that certainty is more likely obtained through judgment in a foreign currency than by application of a rule which had been consistently applied for some 350 years,<sup>73</sup> and that granting judgment in a foreign currency allows a court to further all of these considerations in a manner which is most likely to compensate fairly a plaintiff for the damage suffered,<sup>74</sup> demanded broad application. In subsequent cases, the requirements that the money of payment as well as the money of account be foreign,<sup>75</sup> and that the contract be governed by foreign law,<sup>76</sup> were dropped.

69. *Miliangos*, 1976 A.C. at 467.

70. *Id.* Lord Wilberforce specifically confined his “approval at the present time of a change in the breach-date rule” to “obligations of a money character to pay foreign currency arising under a contract whose proper law is that of a foreign country and where the money of account and payment is that of that country, or possibly of some other country, but not of the United Kingdom.” *Id.* at 467. However, a strong inference that the rule was not intended to be strictly limited is found in the statement that “[i]t is for the courts . . . to work out a solution in each case best adapted to giving the injured plaintiff that amount in damages which will most fairly compensate him for the wrong which he has suffered.” *Id.* at 468.

71. *Id.* at 463.

72. *Id.* at 464.

73. *Id.* at 465.

74. *Id.* at 468.

75. See *George Veflings Rederi A/S v. President of India*, [1979] 1 All E.R. 380 (C.A.). The court, per Lord Denning, held that it was a reasonable inference that the payment should be in dollars, which was the money of account, even though no money of payment was provided for in the contract.

76. See *Barclays Bank Int’l Ltd. v. Levin Bros. Bradford Ltd.*, [1976] 3 All E.R. 900 (Q.B.). Despite the fact that the contract was governed by English law, the court granted judgment in U.S. dollars. See also *Federal Commerce and Navigation Co. v. Tradex Export S.A.* (“*The Martha Envoy*”), [1977] Q.B. 324 (C.A.), *rev’d on other grounds*, 1978 A.C. 1, [1977] 3 W.L.R. 126 (H.L.), where Lord Denning rejected the post-*Miliangos* Practice Direction language which ostensibly limits the power to grant foreign currency judgments to contracts “governed by the law of some country outside the United Kingdom,” Practice Direction, [1976] 1 W.L.R. 83, and stated that “[o]nce it is recognized that judgment can be given in a foreign currency, justice requires that it should be given in every case where the currency of the contract is a foreign currency.” *The Martha Envoy*, [1977] Q.B. at 342 (emphasis in original). In *BP Exploration Co. (Libya) v. Hunt (No. 2)*, [1982] 1 All E.R. 925 (Q.B.), *aff’d*, [1982] 1 All E.R. 978 (C.A.), *aff’d* [1982] 1 All E.R. 986 (H.L.), the English

Two cases merit special notice. In *The Folias*,<sup>77</sup> the House of Lords extended *Miliangos* to provide a foreign currency judgment for damages for a breach of contract governed by English law. The French charterer of a ship rented from a Swedish company brought suit for damages sustained when the ship's refrigeration machinery malfunctioned while carrying a cargo of onions to Brazil. The French charterer had settled with the Brazilian cargo receiver in Brazilian cruzeiros, which had been purchased with French francs. Although the franc was neither the currency of account nor the currency of payment, the House of Lords approved the judgment against the Swedish vessel owner in francs. After noting that the "essential question is what was the loss suffered,"<sup>78</sup> Lord Wilberforce found that "it was reasonable to contemplate that the charterers, being a French corporation and having their place of business in Paris, would have to use French francs to purchase other currencies to settle claims arising under the bills of lading."<sup>79</sup>

At the same time as the House of Lords extended the *Miliangos* rule to breach of contract in the *The Folias*, it extended the rule to damages in tort in *The Despina R.*<sup>80</sup> The *Despina R.*, a Greek ship managed by a company with headquarters in New York, was damaged in a collision with another Greek ship off Shanghai. Temporary repairs were done in Shanghai and paid for in renminbi yuan. Further repairs were made in Yokohama and paid for in Japanese yen, with permanent repairs being made in Los Angeles and paid for in U.S. dollars. The managing company used a U.S. dollar account in New York for all the payments. Lord Wilberforce first determined that judgment in sterling would be inappropriate as it "commits [the plaintiff] to the risk of changes in the value of a currency with which he has no connection." He then considered both "the expenditure currency" and "the plaintiff's currency", applying the "principles of *restitutio in integrum* and that of the reasonable foreseeability of the damage sustained."<sup>81</sup>

courts went so far as to grant judgment in U.S. dollars even where the contract was governed by English law and did not set forth a money of account or payment.

77. *Services Europe Atlantique Sud (SEAS) v. Stockholms Rederiaktiebolag SVEA* ("The *Folias*"), 1979 A.C. 685 (H.L.).

78. *Id.* at 702.

79. *Id.* In approving judgment in French francs, Lord Wilberforce rejected the possibility of judgment in the currency of the contract (U.S. dollars), *id.* at 700-01, the currency of the forum (British sterling), *id.* at 702, or the expenditure currency (Brazilian cruzeiros), *id.* at 696-97, 702-03.

80. *Owners of the M.V. Eleftherotria v. Owners of the M.V. Despina R* ("The *Despina R.*"), 1979 A.C. 685 (H.L.).

81. *Id.* at 697.

## Foreign Currency Judgments

Taken together, *The Folias* and *The Despina R.* go far in demonstrating the wisdom of moving away from the sterling judgment and breach date rules.<sup>82</sup> In both, the application of a sterling judgment rule would have represented a wooden approach and would have failed to fulfill the aim of damages—to place the plaintiff in “as good a position as that he would have been in had [the tort not occurred or] the contract been performed.”<sup>83</sup> Accomplishing this goal requires compensation for foreseeable economic loss, including the loss from post-injury exchange rate fluctuation.<sup>84</sup>

*Miliangos* and its progeny have recognized that, while the mechanical sterling judgment and breach date rules may have achieved just results when sterling was a strong world currency, this foundation for the rules disappeared with the advent of floating currencies. Once the judicial mind perceived that the rules no longer protected the reasonable economic interests of the injured party, but rather allowed for the unjust

82. In *The Folias*, tying a party to the sterling value of the loss at the breach date, when sterling was experiencing a rapid decline in value, would not fairly compensate the plaintiff and would provide the defendant with reason to simply prolong the litigation. In *The Despina R.*, the only connection to England was the forum for dispute settlement. Neither of the parties was doing business primarily in sterling, the repairs were not paid for in sterling, and the accounts out of which the repairs were paid were not sterling accounts. Lord Wilberforce was correct in looking beyond sclerotic rules on currency determination in awarding judgments based upon “the normal principles which govern the assessment of damages in cases of tort,” *id.* at 697, and “general principles of the law of contract . . . and *restitutio in integrum*.” *Id.* at 700. *The Despina R.* rationale was further applied in a tort context in *Hoffman v. Sofaer*, [1982] 1 W.L.R. 1350 (Q.B.), where a U.S. plaintiff sued an English physician for personal injuries. The court awarded general and special damages in U.S. dollars as the currency of the loss and the currency with which the loss was most “closely linked.” *Id.* at 1358. It awarded damages for pain and suffering in British sterling because, said Talbot, J., “It would be quite impossible for me, and I dare say for a good many other judges, to assess such a claim in dollars.” *Hoffman*, [1982] 1 W.L.R. at 1357.

83. RESTATEMENT (SECOND) OF CONTRACTS § 344(a), comment a (1981).

84. The importance of foreign currency judgments in the context of debt, breach of contract, and tort claims by a single plaintiff is evident. Cases in which a number of parties have claims against a single debtor with those claims denominated in more than one currency are more problematic. In *Re Dynamics Corporation of America*, [1976] 2 All E.R. 669 (Ch. Div.), a New York corporation doing business in England was subjected to compulsory winding-up under the Companies Act 1948. The court rejected the dicta of Lords Wilberforce and Cross in *Miliangos* that would apply the exchange rate “when the creditor’s claim in terms of sterling is admitted by the liquidator.” *Id.* at 681 (quoting *Miliangos*, 1976 A.C. at 469). It then held that conversion for all creditors would be made as of the date the winding-up order was issued by the court. *Id.* at 684-85. The court thus avoided the confusion and complexity of looking to different dates for different claims.

Similarly, in *Re Lines Bros. Ltd.*, [1983] 1 Ch. 1, the date of payment dicta of *Miliangos* was rejected in a case of voluntary liquidation. In selecting the exchange rate existing on the date of the commencement of the winding-up, the court noted the need to compare “like . . . with like,” and to value the liquidation fund in sterling. *Id.* at 14 (Lawton, L.J.). The *Miliangos* rationale that any further risk of fluctuation loss should be born by the debtor was rejected as inapplicable where “[t]he sterling creditors are not in default vis-a-vis the foreign currency creditors,” and “[t]he company is the wrongdoer toward both the sterling and the foreign currency creditors.” *Id.* at 16 (Brightman, L.J.).

enrichment of the defendant, the English courts found it relatively easy to adjust rules which had prevailed for some three and a half centuries. This recognition of commercial reality has left English law more consistent with the law of most of its major trading partners.<sup>85</sup> It is time now for the United States to follow this lead and forego its position as one of the last bastions of the procedural home currency judgment rule and the substantive conversion rules that accompany it.<sup>86</sup>

85. Although Canada retains a statutory requirement that judgments be rendered in the home currency, *see* Currency and Exchange Act, CAN. REV. STAT., ch. C-39, § 11 (1970), in determining the date of conversion, the courts have considered themselves "free to adopt that date which in [the court's] view 'avoids an injustice' and is 'in step with commercial needs.'" *Batavia Times Publishing Co. v. Davis*, 88 D.L.R. 3d 144, 153 (Ont. High Ct. of Justice 1978). In most cases, however, Canadian courts have held that original judgments in Canadian courts require application of the breach date exchange rate, *see, e.g.,* *Gatineau Power Co. v. Crown Life Ins. Co.*, [1945] 4 D.L.R. 1, and foreign judgments are generally converted at the date of the Canadian judgment. *See, e.g.,* *Williams & Glyn's Bank v. Belkin Packaging Ltd.*, 18 B.C.L.R. 279 (1978); *Batavia Times*, 88 D.L.R. 3d 144; Court Order Enforcement Act, B.C. REV. STAT., ch. 75, § 33 (1979). Although a payment date exchange rate has been at times considered the most equitable result, it has been determined to be prevented by the language of the Currency and Exchange Act. *Batavia Times*, 88 D.L.R. 3d at 153-54. *But see* LAW REFORM COMMISSION OF BRITISH COLUMBIA, REPORT ON FOREIGN MONEY LIABILITIES 60 (1983) (recommending payment date conversion) [hereinafter cited as LAW REFORM COMMISSION].

In Ontario, legislation providing for a payment date conversion rate was adopted in 1984. The Courts of Justice Act provides an interesting comparison with § 823 of the RESTATEMENT and the alternative proposed in this Article:

§ 131.—(1) Subject to subsections (3) and (4), where a person obtains an order to enforce an obligation in a foreign currency, the order shall require payment of an amount in Canadian currency sufficient to purchase the amount of the obligation in the foreign currency at a chartered bank in Ontario at the close of business on the first day on which the bank quotes a Canadian dollar rate for purchase of the foreign currency before the day payment of the obligation is received by the creditor.

(2) Where more than one payment is made under an order referred to in subsection (1), the rate of conversion shall be the rate determined as provided in subsection (1) for each payment.

(3) Subject to subsection (4), where, in a proceeding to enforce an obligation in a foreign currency, the court is satisfied that conversion of the amount of the obligation to Canadian currency as provided in subsection (1) would be inequitable to any party, the order may require payment of an amount in Canadian currency sufficient to purchase the amount of the obligation in the foreign currency at a chartered bank in Ontario on such other day as the court considers equitable in the circumstances.

(4) Where an obligation enforceable in Ontario provides for a manner of conversion to Canadian currency of an amount in a foreign currency, the court shall give effect to the manner of conversion in the obligation.

(5) Where a writ of seizure and sale or notice of garnishment is issued under an order to enforce an obligation in a foreign currency, the day the sheriff, bailiff or clerk of the court receives money under the writ or notice shall be deemed, for the purposes of this section and any obligation referred to in subsection (4), to be the day payment is received by the creditor.

Courts of Justice Act, Ont. Stat. ch. 11, § 131 (1984).

86. *See* F. Mann, *supra* note 11, at 399-400.



### III. The U.S. Law: The Home Currency Judgment Rule and the Breach Date Judgment Date Framework for Analysis

#### A. Introduction

U.S. case law on foreign currency judgments, like that in England prior to *Miliangos*, has been relatively static. Unlike its English counterpart, however, it has not produced clear results. Uniform acceptance of the assumption that U.S. courts can render judgment only in U.S. currency<sup>87</sup> has focused the controversy on the date for conversion to dollars. The result is that damages awards are inconsistent, and the injured party can never expect to be fully compensated.

The federal courts, based upon two opinions by Justice Holmes,<sup>88</sup> have viewed the conversion issue as a conflict of laws problem.<sup>89</sup> As a general rule, if a liability expressed in a foreign currency is payable in the U.S., federal courts will apply the exchange rate existing on the date of breach.<sup>90</sup> If, however, the same obligation is payable or the cause of action arose in the foreign jurisdiction, the federal courts will apply the exchange rate existing on the date the judgment is rendered.<sup>91</sup> Some

87. See *infra* text accompanying notes 96-97.

88. *Die Deutsche Bank filiale Nuremburg v. Humphrey*, 272 U.S. 517 (1926); *Hicks v. Guinness*, 269 U.S. 71 (1925).

89. See RESTATEMENT OF CONFLICT OF LAWS §§ 423, 424 (1934). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS §144 (1971).

90. *Hicks*, 269 U.S. 71.

91. *Deutsche Bank*, 272 U.S. 517. In fact, the language of Justice Holmes' majority opinion in *Deutsche Bank* never once spoke of the judgment day rate of exchange. Rather, he spoke of "when the suit is brought," "before the suit is brought", and "at the moment . . . the suit is brought." *Id.* at 519, 520. In his dissent, Justice Sutherland took issue with using "the date of judgment for determining the value." *Id.* at 523. The Attorney General of the United States, responding to the Supreme Court's decision, specifically interpreted the case as holding "that in calculating the amount of a decree in favor of the plaintiff upon a debt owing in marks in Germany the rate of exchange as of the date the suit was brought should be adopted." Letter from the Attorney General to the United States Attorney in San Francisco (Dec. 15, 1926), quoted in Jones, *supra* note 11, at 282. Despite the language used by Justice Holmes, subsequent cases and commentators have generally cited *Deutsche Bank* for the judgment date rule. See, e.g., *Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965), cert. denied sub nom. *Tramontana v. Varig Airlines*, 383 U.S. 943 (1966); *Tillman v. Russo Asiatic Bank*, 51 F.2d 1023 (2d Cir. 1931); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 144 (1971); 5 S. WILLISTON ON CONTRACTS § 1410A (3d ed. 1957); 2 BEALE, CONFLICT OF LAWS 1341 (1935); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 49 (1935). However, Jones effectively, rebuts any foundation for finding the judgment day rationale in the Holmes opinion. See Jones, *supra* note 11.

Interestingly, the distinction now attributed to Justice Holmes in the *Hicks* and *Deutsche Bank* cases was correctly anticipated by Judge Augustus N. Hand in two earlier cases. In *The Verdi*, 268 F. 908 (S.D.N.Y. 1920), a claim arose from the collision of two ships in New York Harbor. Even though the repairs were made in England and paid for in English pounds, Judge Hand applied the exchange rate existing on the date of the wrong since the tort was committed in the United States. In *The Hurona*, 268 F. 911 (S.D.N.Y. 1920), Judge Hand held that an advance of 119,000 French francs made and repayable in Marseilles was recoverable at the judgment date rate of exchange.

state courts have followed the federal rule while others have adopted a single breach date conversion rule attributed primarily to New York.<sup>92</sup> Under *Erie*,<sup>93</sup> federal courts in diversity cases apply the state law rule.<sup>94</sup> The result is conflicting analytical foundations between the state and federal courts, a bifurcated breach date/judgment date rule when Justice Holmes' federal court analysis is applied, and general confusion when an attempt is made to come up with a rational statement of the law which will serve some predictive function.

This section will examine the validity of the present home currency judgment rule. The new foreign currency judgment rule proposed by the Restatement (Revised) of Foreign Relations Law raises questions about the status of U.S. law.<sup>95</sup> A review of the history of the language of the courts and Congress also casts doubt on whether a valid foundation for the home currency judgment rule ever existed. Once the myth that judgment must be rendered in U.S. currency is exposed, the following sections will address the problems of state laws and conversion dates that are intertwined with the home currency judgment rule and not solved by the Restatement.

92. The breach date rule was adopted by the New York Court of Appeals in *Hoppe v. Russo-Asiatic Bank*, 235 N.Y. 37, 138 N.E. 497 (1927). *But see* *Perutz v. Bohemian Discount Bank in Liquidation*, 279 A.D. 386, 110 N.Y.S.2d 446 (1952) (deviation from strong breach date rule permitted for entry of judgment based on party stipulation). For a more recent statement of the New York development of this rule, see *De Sayve v. De La Valdene*, 124 N.Y.S.2d 143, 154-56 (Sup. Ct. 1953).

93. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

94. *See, e.g., Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 865-66 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); *Compania Engraw Commercial E. Industrial S.A. v. Schenley Distillers Corp.*, 181 F.2d 876, 879 (9th Cir. 1950).

95. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 823 (Tent. Draft No. 6, 1985). Section 823 represents a revision of § 853 of Tent. Draft No. 5, 1984. As proposed, the new § 823 reads as follows:

§ 823. Obligations in Foreign Currency: Law of the United States

(1) Courts in the United States ordinarily give judgment on causes of action arising in another state, or denominated in a foreign currency, in United States dollars, but they are not precluded from giving judgment in the currency in which the obligation is denominated or the loss was incurred.

(2) If the court gives judgment in dollars in accordance with Subsection (1), the conversion is to be made at such rate as to make the creditor whole and to avoid rewarding a debtor who has delayed in carrying out the obligation.

## Foreign Currency Judgments

### B. *The Home Currency Judgment Rule as Federal Law: Pulling Up the Shallow Roots*

Both courts and commentators have considered it “well settled that a money judgment by an American court must be in American currency.”<sup>96</sup> Nevertheless, the rule’s origin is obscure. Most cases and commentators stating this rule support it with citations to earlier cases that have made the same naked statement.<sup>97</sup> Others contend that section 20 of the Currency Act of 1792<sup>98</sup> supports such a rule.<sup>99</sup> Upon analysis, however, neither the statute nor the case law requires that U.S. courts give judgment only in U.S. currency.

#### 1. The Statute

The purported basis for the home currency judgment rule is section 20 of the Currency Act of 1792, which, until September 1982, stated:

The money of account of the United States shall be expressed in dollars or units, dimes or tenths, cents or hundredths, and mills or thousandths, a dime being the tenth part of a dollar, a cent the hundredth part of a dollar, a mill the thousandth part of a dollar; and all accounts in the public offices and all proceedings in the courts shall be kept and had in conformity to this regulation.<sup>100</sup>

Despite the Currency Act’s apparent unconcern for court procedure, some courts read this language to require them to render judgments in U.S. currency.<sup>101</sup>

In September 1982 Congress revised this provision, “without substantive change,”<sup>102</sup> to read as follows: “United States money is expressed in dollars, dimes or tenths, cents or hundredths, and mills or thousandths. A dime is a tenth of a dollar, a cent is a hundredth of a dollar, and a mill

96. *Shaw, Savill, Albion & Co. v. The Fredricksburg*, 189 F.2d 952, 954 (2d Cir. 1951).

97. *See, e.g., Jamaica Nutrition Holdings v. United States*, 643 F.2d 376 (5th Cir. 1981); *International Silk Guild, Inc. v. Rogers*, 262 F.2d 219, 224 (D.C. Cir. 1958); *Frontera Transport Co. v. Albaunza*, 271 F. 199, 202 (5th Cir. 1921); *B.V. Bureau Wijsmuller v. United States*, 487 F. Supp. 156, 176 (S.D.N.Y. 1979), *aff’d*, 633 F.2d 202 (2d Cir. 1980); *Liberty Nat’l Bank v. Burr*, 270 F. 251, 252 (E.D. Pa. 1921); *Fraenkel*, *supra* note 11, at 360; Note, *The Need to Retreat From Inflexible Conversion Rules—An Equitable Approach to Judgment in Foreign Currency*, *supra* note 11, at 871.

98. Currency Act of 1792, *supra* note 4.

99. *See, e.g., Baumlín & Ernst, Ltd. v. Gemini, Ltd.*, 637 F.2d 238, 244 n.9 (4th Cir. 1980); *International Silk Guild*, 262 F.2d at 224; *The Fredricksburg*, 189 F.2d at 954-55.

100. 31 U.S.C. § 371 (1982).

101. *See supra* note 99.

102. Pub. L. 97-258, 96 Stat. 877, 1067 (1982). Section 4 of this Act states that the Act’s provisions, “restate, without substantive change, laws enacted before April 16, 1982, that were replaced by those sections.” *Id.*

is a thousandth of a dollar."<sup>103</sup> While the views of a subsequent Congress do not override the unmistakable intent of the enacting Congress,<sup>104</sup> they are entitled to weight, particularly when the precise intent of the enacting Congress is not entirely clear.<sup>105</sup> Congress believed in 1982 that the "money of account" language and the provision that "all accounts in the public offices and all proceedings in the courts shall be kept and had in conformity to this regulation" were surplusage.<sup>106</sup> The combination of this belief and the weak historical support for the home currency judgment rule indicates that the rule was never well-founded.

The historical record supports this legislative judgment. In the extensive discussion of the Currency Act by such figures as Thomas Jefferson and Alexander Hamilton, no mention is made of the procedure of the courts.<sup>107</sup> The primary purposes of the Currency Act were to establish

103. 31 U.S.C.A. § 5101 (West Supp. 1984). In recodifying this provision, the word "money" was "substituted for 'money of account' to eliminate unnecessary words." H. REP. NO. 651, 97th Cong., 2d Sess. 146, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 1895, 2040. The words "of account" were determined to be without special meaning in light of Alexander Hamilton's interchangeable use of the phrases "money unit of the United States" and "money of account." *Id.* at 2040 (citing A. HAMILTON, REPORT ON THE ESTABLISHMENT OF THE MINT (1791)). The deletion of the "of account" language comports with the view of one leading commentator who has said that, "the phrase 'money of account' ought definitely to be avoided in a discussion aspiring to scientific accuracy." A. NUSSBAUM, *supra* note 11, at 15-16.

104. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 & n.39 (1977) (views of a subsequent Congress "form a hazardous basis for inferring the intent of an earlier one").

105. *See United States v. Price*, 361 U.S. 304, 313 (1960) (views of a subsequent Congress "entitled to significant weight"). *See also* *Seatrain Shipbldg. Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980).

106. H.R. Rep. No. 651, 97th Cong., 2d Sess. 146-47 (1982), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 1895, 2041.

107. Section 20 of the Currency Act of 1792 was the final section of the Act, and the language in question was the final phrase of that section. It is a phrase which has no foundation in the writings of the principal parties involved in its creation. Resolutions of the Continental Congress of July 6, 1785, and August 8, 1786, each declared "the money unit of the United States" to be the dollar and further provided for the adoption of a decimal system of coinage. Resolution of 6 July 1785, *reprinted in* XXIX JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 499-503 (1933); Resolution of 8 August 1786, *reprinted in* XXXI JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 503 (1933). No mention is made in either of these resolutions to a relationship between the resolution and procedure in U.S. courts. The statute addressed the unit which would become the currency for the states and the preparations for the creation of a national mint. Resolution of 6 July 1785, *supra*; Resolution of 8 August 1786, *supra*. *See also* Report of Robert Morris to the President of Congress, 15 January 1782, *reprinted in* 7 PAPERS OF THOMAS JEFFERSON 160 (J. Boyd ed. 1953); T. Jefferson, Notes on Coinage, *reprinted in* 7 PAPERS OF THOMAS JEFFERSON at 175.

The discussions of Robert Morris and Thomas Jefferson were further developed by Alexander Hamilton in his capacity as Secretary of the Treasury after the adoption of the Constitution. *See* A. Hamilton, Final Version of the Report on the Establishment of a Mint (1791), *reprinted in* 7 PAPERS OF ALEXANDER HAMILTON 570 (H. Syrett ed. 1963). In his Report, Hamilton listed six "particulars required to be discussed." While one of Hamilton's six "particulars" for the Treasury was whether foreign coins should be permitted to be "current," *id.* at 572, his concern was with the establishment of a domestic form of currency and not with its

## Foreign Currency Judgments

the coin of the United States, choose the decimal system for determining fractions of that coin, and create a national mint.<sup>108</sup>

### 2. The United States Case Law

The rule that a federal court may not grant a judgment in a foreign currency has a long heritage.<sup>109</sup> Foreshadowed by two opinions of Justice Chase in 1869,<sup>110</sup> the rule was clearly accepted in two seminal opinions by Justice Holmes,<sup>111</sup> and it has since become orthodoxy for the federal courts.<sup>112</sup> The rule has been accepted so routinely that most courts expressing it have not considered the possibility of granting judgment in a foreign currency. Consequently, the cases provide no more reasoned support for the home currency judgment rule than does section 20 of the Currency Act of 1792.

The two opinions of Chief Justice Chase that provide the genesis of current rationale for the home currency judgment rule in U.S. case law

use in the courts. *Id.* at 604-05. There exists, as far as this author can determine, no explanation of the addition of the phrase, "and that all accounts in the public offices, and all proceedings in the Courts of the United States shall be kept and had in conformity to this regulation," in the Currency Act of 1792 to the language previously used in the Resolutions of the Continental Congress of July 6, 1785 and August 8, 1786. As such, Congress appears to have been correct in 1982 when it found this language to have been "surplus." H.R. Rep. No. 651, *supra* note 106. The "money of account" term appears simply to have been considered in 1792 to have been synonymous with the phrase "money unit of the United States" which had been used in the Continental Congress Resolutions of July 6, 1785, and August 8, 1786. It appears in no way to have been considered analogous to the currency of account—currency of payment distinction considered so important by the English courts in dealing with the foreign currency judgments issue. *See supra* note 16.

108. *See supra* note 107.

109. It has been suggested that the home currency judgment rule in Anglo-American law is a result of the fact that, in the Middle Ages, when a "creditor had a choice between two actions; he could sue the debtor for the foreign money in 'debt in the *detinet*', or in the ordinary action of debt for its equivalent in English money." A. NUSSBAUM, *supra* note 11, at 365. In the action for debt in the *detinet*, the creditor was entitled to specific recovery of that which the debtor was obligated under the contract to provide. 1 REEVES, ENGLISH LAW 159 (1814); *see also* *Rands v. Peck*, 79 Eng. Rep. 527 (1622). Once this action became obsolescent, the only alternative available became to sue in debt for the home currency equivalent of the foreign currency, thereby requiring conversion at some applicable rate. Civil law courts have traditionally held judgments in foreign currency to be lawful and have preferred specific performance to home currency damages. *See* A. NUSSBAUM, *supra* note 11, at 374-76; F. MANN, *supra* note 11, at 339-40. This preference for specific performance is reflected in the United Nations Convention on Contracts for the International Sale of Goods, which was adopted in 1980. U.N. DOC. A/CONF. 97/18, Annex I, arts. 46(1), 63(1) (1980). Should the United States ratify the Convention, we may at that time have come full circle in the process, at least as regards international transactions.

110. *Butler v. Horwitz*, 74 U.S. (7 Wall.) 258 (1869); *Bronson v. Rodes*, 74 U.S. (7 Wall.) 229 (1869). Cases prior to these had been primarily concerned with the distinction between the statutorily established par of exchange and the market rate of exchange. *See infra* note 127.

111. *Die Deutsche Bank filiale Nuremburg v. Humphrey*, 272 U.S. 517 (1926); *Hicks v. Guinness*, 269 U.S. 71 (1925).

112. *See supra* notes 96-97.

are seldom cited today. Rather than supporting the home currency judgment rule, however, they stand for the proposition that the result should "give full effect to the intention of the parties as to the medium of payment."<sup>113</sup> In *Bronson v. Rodes*,<sup>114</sup> the Court considered the effect of the Legal Tender Act<sup>115</sup> on a loan in gold and silver coin made prior to its passage. In a context directly analogous to foreign currency exchange, the Court rejected the plaintiff's attempt to pay his debt in the devalued currency of the forum—the U.S. dollar.<sup>116</sup> While in dicta it found that payment generally should be made in paper notes when the contract specified payment in dollars, the Court held that when the contract specifically required payment "in coin," judgment must be entered in "coined dollars and parts of dollars."<sup>117</sup> The tender of the nominal amount due in United States notes was rejected as insufficient, and judgment was ordered for the amount due in gold or silver coin.<sup>118</sup>

The Supreme Court faced a similar issue shortly thereafter in *Butler v. Horwitz*.<sup>119</sup> A ninety-nine year lease entered on February 18, 1791, called for rent in the "sum of £15, current money of Maryland, payable in English golden guineas . . . and other gold and silver at their present established weight."<sup>120</sup> Following *Bronson*, the court held that payment was due in gold and silver coin because the "obvious intent of the contract . . . was to secure payment of a certain rent in gold and silver, and thereby avoid the fluctuations to which the currency of the country, in the days which preceded and followed the establishment of our independence, had been subject, and also all future fluctuations."<sup>121</sup> However, as the parties were agreed that £15 was equal to \$40 in gold and silver, the Court did not consider granting judgment in English currency.<sup>122</sup>

The proposition that *Bronson* and *Butler* establish a foundation for a home currency judgment rule is belied by the specific language of *Butler*. After determining that payments in coin could be considered an assessment of lawful money permissible in U.S. courts, the Court held that the

113. *Bronson*, 74 U.S. at 261.

114. 74 U.S. (7 Wall.) 229 (1869).

115. Act of 25 February 1862, ch. 33, 12 Stat. 345.

116. *Bronson*, 74 U.S. at 229. The documentation on the loan called for payment in gold or silver, the medium in which all currency at the time of the contract was redeemable. See *Rodes v. Bronson*, 34 N.Y. 649 (1866). Plaintiff in 1865 tendered United States notes in the amount of \$1,507 in payment of a debt incurred in 1851. The defendant refused the payment in notes because, although it was nominally equal to the principal due on the bond and mortgage involved, gold and silver dollars, the original currency of account, were equivalent in value to \$2.25 in United States notes.

117. *Bronson*, 74 U.S. at 254.

118. *Id.* at 255.

119. 74 U.S. (7 Wall.) 258 (1869).

120. *Id.* at 259.

121. *Id.*

122. *Id.*

## Foreign Currency Judgments

intent of the parties would govern on the issue of currency of judgment. It stated:

We are of the opinion, therefore, that under the existing law, of which, in respect to legal tender, the constitutionality is, we repeat, in this case, assumed, damages may be properly assessed and judgments rendered, so as to give full effect to the intention of parties as to the medium of payment. When, therefore, it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver, damages should be assessed and judgment rendered accordingly.<sup>123</sup>

When the language of *Bronson v. Rodes* and *Butler v. Horwitz* is applied to contracts or other obligations for which liability is denominated in terms of a foreign currency, the result is not entirely clear. Neither *Bronson* nor *Butler* squarely held that a U.S. court cannot give judgment in a foreign currency. That issue was not before the court in either case.<sup>124</sup> These cases can best be summarized as holding that U.S. courts were able to give judgment in either coin or note, and when a contract specifically called for payment in coin, judgment was required to be in coin.<sup>125</sup>

The cases generally cited for the home currency judgment rule are *Hicks v. Guinness*<sup>126</sup> and *Deutsche Bank*.<sup>127</sup> Moreover, although Justice

123. *Id.* at 261. *Bronson* "in fact upholds the freedom of contract between parties to define, as between themselves, a standard of value". *Id.* See also Eder, *supra* note 11, at 68.

124. Although the Court in *Butler* might have considered judgment in English golden guineas, it implicitly chose not to do so.

125. Although one might interpret the *Bronson* and *Butler* dicta as authority for the proposition that the legal tender statutes, even without section 20 of the Currency Act of 1792, require that U.S. courts render judgments in U.S. currency, to do so would not only be contrary to the more specific language of *Butler* but would also be antithetical to the Supreme Court's own language in the more directly applicable cases. The current legal tender statute provides that "[f]oreign gold or silver coins are not legal tender for debts." 31 U.S.C. § 5103 (1982). In *Hicks v. Guinness*, 269 U.S. 71, 80 (1925), when faced with almost identical language in the predecessor statute, the Court did not once question the right of the parties to contract for a debt in German marks payable in the United States.

126. 269 U.S. 71 (1925).

127. 272 U.S. 517 (1925). The fact that these cases arose in the 1920's does not mean that the issue had not been faced in U.S. courts prior to that time. However, earlier American cases provide little guidance in determining a contemporary rule, largely because they approached the problem, not from the point of view of either the possibility of granting judgment in a foreign currency or of the date on which the foreign currency was to be valued, but instead by discussing whether the *par of exchange* or the *rate of exchange* was to be applied for valuation purposes. See, e.g., *Grant v. Healey*, 10 F. Cas. 978, 979 (C.C.D. Mass. 1839) (No. 5696). From 1793 until 1857, and again after 1873, Congress periodically enacted statutes which set the value of foreign currencies for specific purposes. See Act of Feb. 9, 1793, 1 Stat. 300 (1793); Act of March 3, 1873, 17 Stat. 603 (1873); *King v. Hamilton*, 12 F. 478 (C.C.D. Or. 1882); *Fraenkel*, *supra* note 11, at 361 nn. 6-7. Since 1894, statutory determination of the value of foreign coins has been based upon metal content, with values for conversion in the collection of duties on imports set by the Secretary of the Treasury or determined at the market buying rate as certified by the Federal Reserve Bank of New York. Act of Aug. 27, 1894, ch. 349, § 25, 28 Stat. 552 (1894), codified as amended at 31 U.S.C. § 5151 (1982). It was

Holmes in these cases found that judgments in United States courts must be rendered in U.S. currency, his decisions were not based upon any statutory or judicial precedent. His analysis simply accepted the restriction in the course of developing a method for determining the date at which conversion should be made. In *Hicks*, Justice Holmes held that an American creditor of a German firm was entitled to payment of the full dollar value of the Deutsch marks it was owed as of the date the debt became due. Accepting counselor's argument that a U.S. court could only grant judgment in U.S. dollars,<sup>128</sup> the Court held that as the debt became due in the United States, it should be converted into dollars on the date it became due.<sup>129</sup> In *Deutsche Bank*, on the other hand, the Court limited the plaintiff's recovery to the dollar value of his German debt at the date of judgment. As the plaintiff's obligation was solely a German one,<sup>130</sup> there was no U.S. dollar obligation until the United States judgment was rendered.<sup>131</sup>

The logic behind Holmes' opinions, in contrast to his language, provides further support for the argument that judgment may be granted in a foreign currency. The consideration motivating Holmes' analysis was that an injured party should not receive a more favorable judgment simply by virtue of the forum in which the suit was brought. An obligation, he stated in *Deutsche Bank*, should not be "enlarged by the fact that the creditor happens to be able to catch his debtor [in the United States]."<sup>132</sup> Logically then, the goal in awarding a foreign currency judgment, of providing the same result as would have been reached in a foreign court, dictates that judgment be granted in a foreign currency. Thus, rather than providing added support for the home currency judgment rule,

often contended that the courts should apply the statutory rates for all purposes, *Butte v. Hoge*, 2 Hilt. 81, 83 (N.Y. 1858); *Purviance v. Neave*, 4 H. & McH. 199, 204-05 (C.A. 1798), but was ultimately determined that the value of foreign money was to be determined by the facts of the case rather than by legislative directive. *Robinson v. Hall*, 28 How. Pr. 342 (N.Y. 1864); *Guiteman v. Davis*, 3 Daly 120 (N.Y. 1869). In the earlier cases of *Martin v. Franklin*, 4 Johns. 124 (N.Y. 1809), *Scofield v. Day*, 20 Johns. 102 (N.Y. 1822), *Adams v. Cordis*, 25 Mass. 260 (1829), and *Alcock v. Hopkins*, 60 Mass. 484 (1850), par was used as the measure of value, generally without reference to any statute. In *Grant v. Healey*, 3 Sumn. 523 (C.C.D. Mass. 1839), Justice Story used an earlier version of Justice Holmes' choice of law analysis to declare that par of exchange was to govern a bill payable in the U.S., whereas rate of exchange would govern if the bill were payable abroad. All of these cases assumed application of the judgment date or trial date rate of exchange. The par of exchange versus rate of exchange distinction means that most early cases are relatively useless today, at least as far as the narrow holdings are concerned.

128. 269 U.S. at 80.

129. *Id.*

130. 272 U.S. at 517. Plaintiff had deposited money on demand in a German bank which defaulted on the obligation.

131. *Id.* at 519.

132. *Id.* at 517.



## Foreign Currency Judgments

Holmes' choice of law analysis provides a rationale for granting foreign currency judgments in U.S. courts. In fact, the language of Chief Justice Chase in *Butler*, that "damages may be properly assessed and judgments rendered, so as to give full effect to the intention of the parties as to the medium of payment,"<sup>133</sup> combined with Holmes' observation that our courts ought to enforce the same obligation as exists under the foreign law applicable to a claim, leads to the logical result that judgment should be granted in a foreign currency where the facts support a foreign currency claim.

### IV. The Move for Change in the United States: Disenchantment with Our Rules

#### A. Comparisons with the English Rule

The move to a foreign currency judgment rule in the U.S. has been retarded by the strong position of the dollar relative to other currencies<sup>134</sup> and the flexibility the Holmesian analysis provides to courts struggling to avoid inequitable results.<sup>135</sup> By capitalizing on the lack of clarity in the conversion rules,<sup>136</sup> United States courts have "endeavored to select the rule that, in a given case, will prevent the loss from fluctuation of exchange rates from being borne by the injured or non-breaching party."<sup>137</sup> Nevertheless, events analogous to those in England prior to

133. *Butler*, 74 U.S. at 261.

134. See, e.g., *The Dollar's Performance Since 1973*, N.Y. Times, Sept. 24, 1985, at A49, col. 4. Notable exceptions to the general strength of the dollar include the efforts of the Nixon and Reagan Administrations in 1971 and 1985, respectively, to force down the value of the dollar. See 7 WEEKLY COMP. PRES. DOC. 1168 (1971); *Dollar Plunges to 16-Month Low in Reaction to 5 Nations' Accord*, N.Y. Times, Sept. 24, 1985, at A1, col. 4. In 1978-81, market forces worked to depress the value of the dollar. *The Dollar's Performance Since 1973*, *supra*.

135. Although much confusion has been generated in U.S. courts by decisions which have vacillated between the breach date and the judgment date rates of exchange, the lack of clarity in the decisions has generally allowed a court to construct an opinion which allows it to select what it believes is the most equitable of the two possible results, and even to vary the definition of the dates of breach and judgment. See, e.g., *In Re Good Hope Chemical Corp.*, 747 F.2d 806 (1st Cir. 1984). Even if a court concludes that a judgment in foreign currency would produce the most equitable result (the equivalent of a payment date conversion rate), it can avoid the harshness of a breach date ruling and select the judgment date as the applicable date for determining the exchange rate, thereby coming closer to the desired result than would have been possible in a pre-*Miliangos* English court.

136. See *supra* note 135, *infra* notes 217-18.

137. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 823, Reporter's Note 4 (Tent. Draft No. 6, 1985). Compare *Jamaica Nutrition Holdings, Ltd. v. United Shipping Co.*, 643 F.2d 376, 381 (5th Cir. 1981) ("We see no reason to place the risk of devaluation on (or to grant the possibility of profit by appreciation to) the injured party.") and *Skibs A/S Gylfe v. S/T Trujillo*, 1954 A.M.C. 233, 236 (2d Cir. 1954) ("It is fairer to put the risk of fluctuation of foreign exchange on the tortfeasor than on the innocent injured party.") with *Die Deutsche Bank filiale Nurnberg v. Humphrey*, 272 U.S. 517, 519 (1926) ("An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor

*Miliangos* presage the demise of the home currency judgment rule.<sup>138</sup> The new section 823 of the Restatement<sup>139</sup> indicates dissatisfaction with existing rules. In addition, other developments have echoed the English precursors of the *Miliangos* rule.

### 1. Revision of the Currency Act

As already mentioned,<sup>140</sup> the 1982 revision of section 20 of the Currency Act of 1792 eliminated the provision that proceedings in court be kept in conformity with regulations establishing the U.S. dollar as the national currency. Section 20 is now clear in this regard. It establishes the dollar as the currency of the United States and does not purport to determine court procedure. Thus, while at one time section 20 might have been interpreted to support the proposition that judgments must be rendered in U.S. currency, the 1982 revision has removed this possibility.<sup>141</sup> There is no longer any statutory support for the home currency judgment rule.

profits by the change the law takes no account of it.") See also *B.V. Bureau Wijsmuller v. United States*, 487 F. Supp. 156 (S.D.N.Y. 1979), aff'd, 633 F.2d 202 (2d Cir. 1980) (a Dutch salvor of a U.S. Navy vessel was awarded an "equitable uplift" in order to compensate for a decline in the value of the dollar relative to Dutch guilder from the time of salvage to the date of judgment); *Librarie Hachette v. Paris Book Center, Inc.*, 62 Misc. 2d 873, 309 N.Y.S.2d 701 (Sup. Ct. 1970) (where the court ruled that the equities favored application of the breach date rule when a U.S. purchaser failed to pay French francs for books received from a French publisher and the French franc had declined in value against the dollar); A. NUSSBAUM, *supra* note 11, at 406 ("Civil law courts exhibit a tendency to throw the risk of depreciation of the money of damages upon the wrongdoer.").

*Cornel Watch, S.A. v. Peterson State Bank*, 565 F. Supp. 259 (N.D. Ill. 1983), is the only U.S. case to have flatly rejected the argument that "it is fairer to put the risk of fluctuation of foreign exchange on the tortfeasor than on the innocent party." *Id.* at 263. The case involved a contract for the delivery of Swiss watches in Illinois, with payment in Swiss francs. Although the dollar had declined in value during the period between the breach and the judgment, the court applied the breach date rule. In so doing, it stated that, "[w]hile in the past, the rate of exchange prevailing at the date of breach did predominantly favor the plaintiff, this fact does not appear to be a significant reason for the court's choice of a breach-date rule." *Id.* at 262. See generally Note, *The Need to Retreat From Inflexible Conversion Rules—An Equitable Approach to Judgment in Foreign Currency*, *supra* note 11, at 875.

138. See *supra* notes 41-46 and accompanying text.

139. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 823 (Tent. Draft No. 6, 1985).

140. See *supra* notes 98-108 and accompanying text.

141. Although the omission of language from a statute by a subsequent legislature may not be probative of the intent of the enacting legislature, courts have in the past used the omission of language, even though accidental, to free themselves from a rule they viewed as inconsonant with judicial imperatives. Cf. *Freeman v. United States*, 243 F.2d 353 (9th Cir. 1917), *cert. denied*, 249 U.S. 600 (1919) (omission of language from the Judiciary Act of 1891 construed to preclude appeal of sentences which would be impracticable).

### 2. Enforcement of Foreign Arbitral Awards

U.S. ratification in 1970 of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>142</sup> gives the federal courts power over the determination of a foreign currency claim similar to the authority exercised by the British courts under the 1950 Arbitration Act.<sup>143</sup> The Convention and its implementing legislation<sup>144</sup> make enforcement of foreign arbitral awards a question arising under federal law, regardless of the amount in controversy.<sup>145</sup> Under Article III of the Convention, each Contracting State is required to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon."<sup>146</sup> A United States court with jurisdiction will "confirm the award," unless certain grounds for refusal or deferral of recognition are found.<sup>147</sup>

Prior to the ratification of the Convention, courts had held that, "[a]n arbitration award in this country, like the decision of a court, must direct payment in dollars."<sup>148</sup> However, several cases subsequent to ratification imply that "confirmation" of an award in a foreign currency would be permissible.<sup>149</sup> Such cases demonstrate that enforcement of an arbitral award rendered outside the United States in a foreign currency is not too administratively costly. The requirement that arbitral awards rendered in the United States must be rendered in U.S. dollars, like its counterpart in the judgment context, is no longer supportable and should be rejected.<sup>150</sup>

142. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (entered into force for the United States Dec. 29, 1970) [hereinafter cited as New York Convention].

143. See *supra* notes 43, 61-62, and accompanying text. Lord Wilberforce found the precedent of arbitral awards enforced in a foreign currency persuasive in *Miliangos*. 1976 A.C. at 464.

144. United States Arbitration Act, Title II, Act of July 31, 1970, 9 U.S.C. §§ 201-08 (1982).

145. *Id.* § 203.

146. New York Convention, *supra* note 142, art. III.

147. 9 U.S.C. § 207 (1982).

148. See, e.g., Application of United Shellac Corp., 277 A.D. 147, 148, 97 N.Y.S.2d 817, 822 (1950).

149. See, e.g., *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974) (enforcing an arbitral award "for 445,682.35 Netherlands Antilles guilder, to be converted into United States dollars at the rate prevailing on the date of judgment"); *Waterside Ocean Navigation Co. v. Int'l Navigation Ltd.*, 737 F.2d 150 (2d Cir. 1984) (upholding judgment in which an arbitral award rendered in London was confirmed "in the sum of \$1,634,442.33 and 15,754 pound sterling"); *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948 (S.D. Ohio 1981), *reconsideration denied*, 530 F. Supp. 542 (S.D. Ohio 1982) (indicating that award of 9,679,000 Indian rupees could be rendered in U.S. courts). These cases parallel the *Jugoslavenska* decision in England. See *supra* note 43.

150. See *infra* text accompanying notes 225-59.

### 3. Enforcement of Foreign Judgments

Prior to *Miliangos*, English courts provided some movement away from a strict breach date conversion rule by interpreting the 1933 Foreign Judgments (Reciprocal Enforcement) Act to hold that conversion in an action enforcing a foreign judgment would be made at the date on which the foreign judgment was rendered, and not the original breach date.<sup>151</sup> Similarly, the Second Circuit has held that, under New York law, which follows a strict breach date conversion rule, the conversion date in a foreign judgment enforcement action is the date on which the judgment was rendered in the foreign jurisdiction.<sup>152</sup> In each case the court expressed concern for the inequities of a strict breach date conversion rule, but determined that adherence to such a rule was required,<sup>153</sup> and then constructed a holding which provided for equitable modification of the rule.

### 4. Recognition of Foreign Law in Awarding Pre-Judgment Interest

Although the amount of interest due on a judgment is often considered a secondary issue, it is important in the context of currency exchange rate fluctuations.<sup>154</sup> Interest rates often represent an important component of the exchange rate equation.<sup>155</sup> Recent United States decisions

151. See, e.g., *East India Trading Co. v. Carmen Exporters and Importers, Ltd.*, [1952] 2 Q.B. 439.

152. *Competex, S.A. (in Liquidation) v. LaBow*, No. 85-7605 (2d Cir. Feb. 12, 1986) (available Mar. 15, 1986, on LEXIS, Genfed library, USAPP file).

153. See, e.g., *id.* (pagination not available).

154. This factor is well-presented in Bowles & Phillips, *Judgments in Foreign Currencies: An Economist's View*, 39 MOD. L. REV. 196, 197-98 (1976):

It can be seen that over the period illustrated [in the article], when sterling has been depreciating against both the Deutschmark and the Swiss franc, United Kingdom Minimum Lending Rate has been approximately double the German and Swiss interest rates. This is to be expected since the central banks of countries with depreciating currencies generally use increases in interest rates to attract foreign investment by offsetting, to some extent, the expected devaluation on the capital. If the devaluation were fully offset by the change in interest rates, the application of the old rules would amount to full compensation, since the effect of sterling's depreciation on the value of the debt in a foreign creditor's own currency would then be associated with a (higher) rate of interest payable on it; but in practice the relationship between exchange rates and interest rates is not so straightforward.

155. English treatment of interest rate determinations has recognized the need to treat interest rates as separate and important components of damage awards. In *Helmsing Schiffahrts G.m.b.H. v. Malta Drydocks Corp.*, [1977] 2 Lloyds L. R. 444 (Q.B.), the court refined the analysis of *Miliangos* (No. 2), [1976] 3 All E.R. 599, [1977] Q.B. 489. *Miliangos* explicitly recognized the relationship between exchange rates of currencies and interest rates. Upon remand from the House of Lords, Judge Bristow expressly stated that, in calculating the amount of the judgment debt, Swiss interest rates should be applied to the original Swiss franc debt. "In my judgment the approach in English law should be: if you opt for a judgment in foreign currency, for better or for worse you commit yourself to whatever rate of interest obtains in the context of the currency." *Miliangos* (No. 2), [1977] Q.B. at 495. This position has been taken by the Law Commission in its final report: "where judgment is given in a

## Foreign Currency Judgments

demonstrate the exercise of judicial discretion in this area in a manner inconsistent with the home currency judgment rule.

Several U.S. cases have made reference to foreign law on interest rates in their damage awards. Those cases falling into the domain of the Convention on Foreign Arbitral Awards have upheld foreign interest rates chosen by arbitrators for pre-judgment interest.<sup>156</sup> While the Convention legitimizes the application of non-domestic factors occurring prior to U.S. enforcement, courts still adhere to domestic law for post-judgment interest.<sup>157</sup>

The application of foreign law on interest rates in U.S. judgments has not been limited to enforcement of foreign arbitral awards. Where arbitration has not been involved, other approaches have been applied, such

foreign currency, the interest should, prima facie, be awarded at the rate applicable to that currency." Law Commission Report No. 124, Private International Law Foreign Money Liabilities, ¶ 2.33 (1983).

The court in *Helmsing Schiffahrts*, finding this rule unworkable, adopted a more flexible version of the holding in *Miliangos*. The plaintiff in *Helmsing Schiffahrts* found it necessary to borrow money in Germany at German commercial borrowing rates when the defendant failed to make proper payment on the contract involved, although the currency of the contract was Maltese pounds. Judge Kerr, following *Miliangos*, rendered judgment in Maltese pounds. However, he also held that the plaintiffs were entitled to interest calculated according to prevailing German commercial borrowing rates. The court distinguished this case from the simpler case of *Miliangos* by explaining that when the currency of account and the plaintiff's own currency were not the same, a different rule should be applied. The controlling standard, also enunciated in *Miliangos*, should be the location where the plaintiff reasonably would have borrowed the money.

156. In *Laminours-Tefileries-Cableries de Lens v. Southwire Co.*, 484 F. Supp. 1063 (N.D. Ga. 1980), for example, the court enforced a foreign arbitral award while specifically allowing the interest rate for the award to remain at the French legal rate chosen by the arbitrators. The court recognized that interest on a French franc obligation should be at the French rate of interest, calculated from the breach date to the judgment date. However, the court refused to enforce a portion of the arbitral award that assessed an additional 5% interest, finding that such an award was penal in nature, and not for the redress of private injuries. *Id.* at 1070-71. In *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948 (S.D. Ohio 1981), a federal district court in Ohio was asked to enforce an arbitral award rendered in India. The court ordered post-judgment interest but refused to grant pre-judgment interest on the award, since such interest was not available under the Indian Arbitration Act. However, adjourning the petition for enforcement while the award was before the Indian courts for review, the court indicated that upon favorable review in the Indian courts, it would enforce the award and "order interest as of the date this opinion is entered." *Id.* at 962. In so doing, the court recognized that Indian law concerning interest on the award would apply until such time as the award became enforceable by judgment in the United States.

157. See 28 U.S.C. § 1961(a) (1982) (post-judgment interest rate statute). Although the court in *Laminours* found that the award was to be converted into U.S. dollars in accordance with a judgment date rule using the date of the district court's judgment, it held that subsequent interest was to be governed by the federal post-judgment rate statute. 484 F. Supp. at 1071. This statute has been expressly interpreted as governing only post-judgment interest, leaving determinations of pre-judgment interest to the sole discretion of the court. See *G.M. Brod & Co. v. U.S. Home Corp.*, 759 F.2d 1526, 1542 (11th Cir. 1985); *Weitz Co. v. Mo-Kan Carpet, Inc.*, 723 F.2d 1382, 1385-87 (8th Cir. 1983); *S.L. Sethia Liners, Ltd. v. The Egyptian Co. for Maritime Transport*, No. 82 Civ. 2886 (S.D.N.Y. Mar. 14, 1985) (available Mar. 15, 1986, on LEXIS, Genfed library, Dist. file).

as choice of law analyses recognizing foreign law. Discretion arising from this approach has allowed the choice of the pre-judgment interest rate to be made on the basis of equity.<sup>158</sup>

Deference by U.S. courts to foreign interest rates has arisen in some cases despite strong precedent that damage awards passing through U.S. courts be in U.S. currency computed by U.S. standards. Recognition of foreign law in a determination of pre-judgment interest represents a concession by U.S. courts to the realities of international markets; courts in this context do not take the home currency rule as an absolute.

### 5. Consent Judgment in Foreign Currency

Although no American case has clearly granted judgment after trial in a foreign currency, an example of judgment in a foreign currency does exist other than in the enforcement of a foreign judgment or arbitral award. In *Baumlin & Ernst, Ltd. v. Gemini, Ltd.*,<sup>159</sup> a consent judgment was originally entered in the district court, requiring the American buyer to satisfy its payment obligation on a contract for the sale of Swiss yarn by making six installment payments over a period of five years. The seller insisted that the consent judgment be expressed in Swiss francs and not in U.S. dollars to avoid the risk of currency fluctuation where payment was to be in stages over a period in excess of four years.<sup>160</sup> When the buyer later defaulted, the fourth circuit noted that, "a customary judgment would have had to have been stated in United States dollars," but went on to affirm the consent judgment expressed in Swiss francs as "an entirely new agreement not subordinate to anything that had gone before."<sup>161</sup>

Although *Baumlin* did not amount to a final judgment being entered in a foreign currency after trial, and even though the opinion expressly stated that such a judgment would have to be stated in U.S. currency, the case does represent a binding judgment rendered in the federal courts which was expressed in a foreign currency. The *Baumlin* court relied upon section 20 of the Currency Act of 1792 and cases citing it for the

158. In *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*, 566 F. Supp. 1558 (D. Del. 1983), a Delaware district court dealt with the interest problem by noting that both the availability and rate of prejudgment interest on an action arising under Jamaican law were to be determined by the law of Jamaica. The case involved an action for wrongful interference with a contract for the sale of hotel property in Jamaica to an agency of the Jamaican government. The court rendered judgment in U.S. dollars both because of the currency of the loss and of the plaintiff. However, determining whether and at what rate pre-judgment interest was to be awarded, the court, sitting in diversity, looked to the conflict of law rules of Delaware, which were determined to direct the court to Jamaican law. Jamaican law was construed to allow pre-judgment interest at a rate to be set at the discretion of the court.

159. 637 F.2d 238 (4th Cir. 1980).

160. *Id.* at 240.

161. *Id.* at 245.

## Foreign Currency Judgments

proposition that judgment after trial in a U.S. court must be in U.S. currency.<sup>162</sup> With this reliance no longer justified it appears that a U.S. court could take the step from rendering a consent judgment in foreign currency to rendering a judgment after trial in foreign currency.

The likely adoption of a foreign currency judgment rule in the United States still leaves problems. As drafted, the Restatement foreign currency judgment rule will allow the victorious plaintiff to choose between a judgment in U.S. dollars or in foreign currency. The Restatement has not addressed which type of judgment is more equitable or the control the court should exercise in the judgment.<sup>163</sup> In addition, many state statutes appear to be in conflict with the foreign currency rules and, if followed, would lead to inconsistent results. It is to these problems that this Article now turns in the further consideration of the home currency judgment rule.

### B. *State Law and the Erie Problem*

The Revised Restatement provides that “[c]ourts in the United States . . . are not precluded from giving judgment in the currency in which the obligation is denominated or the loss was incurred.”<sup>164</sup> While this may be true for federal courts in the exercise of federal question jurisdiction,<sup>165</sup> when a case arises in a state court or in a federal court sitting in diversity, the court may be precluded by state law from granting a pure foreign currency judgment.

At least eighteen states have statutes whose language may be construed to require a home currency judgment.<sup>166</sup> Statutes in seven of these states—California, Iowa, Maryland, Montana, South Carolina, Tennessee, and Vermont—explicitly require judgment to be rendered in U.S.

162. *Id.* at 244 & n.9.

163. The Restatement’s “extreme rule of creditor’s preference that can enable the creditor to benefit from currency fluctuations,” has already been the subject of judicial criticism. *See* *Competex, S.A. (in Liquidation) v. LaBow*, No. 85-7605 (2d Cir., Feb. 12, 1986) (available Mar. 15, 1986, on LEXIS, Genfed library, USAPP file) (pagination not available).

164. RESTATEMENT, *supra* note 95.

165. *See supra* notes 96-133 and accompanying text.

166. ARK. STAT. ANN. § 29-115 (1947); CAL. CIV. PROC. CODE § 577.5 (West 1976); CAL. GOV’T CODE § 6850 (West 1980); IDAHO CODE § 28-42-401 (1980); IOWA CODE ANN. § 535.1 (West 1950); LA. REV. ST. ANN. § 1:53 (West 1973); MD. CTS. & JUD. PROC. CODE ANN. § 11-101 (1984); MICH. COMP. LAWS ANN. § 438.1 (WEST 1978); MONT. CODE ANN. § 25-9-203 (1983); NEV. REV. STAT. §§ 17.120, 17.130 (1979); N.J. REV. STAT. § 51:2-1 (1970); N.M. STAT. ANN. § 56-8-1 (1978); N.Y. JUD. LAW § 27 (McKinney 1983); S.C. CODE ANN. § 34-31-10 (Law. Co-op 1977); TENN. CODE ANN. § 47-14-101 (1984); VT. STAT. ANN. tit. 9, § 1 (1984); VA. CODE § 6.1-330.6 (1983); W. VA. CODE § 47-6-1 (1980); WIS. STAT. ANN. § 138.03 (West 1974).

currency.<sup>167</sup> In four others—Arkansas, Nevada, New York, and Wisconsin—the statutes initially state a requirement that judgments be in “dollars and cents,” but include language implying that the legislative purpose did not include consideration of foreign currency judgments.<sup>168</sup> Five of the eighteen states have statutes which mirror the “money of account” language originally included in section 20 of the Currency Act of 1792.<sup>169</sup> None of these statutes has been the subject of recorded judicial interpretation. They present the same ambiguities as the original

167. CAL. CIV. PROC. CODE § 577.5 (West 1976) (“In any judgment, or execution upon such judgment, the amount shall be computed and stated in dollars and cents, rejecting fractions.”); IOWA CODE ANN. § 535.1 (West 1950) (“Demands expressed in money of another denomination [other than U.S. dollars] shall not be affected by the provisions of this section, but in any action or proceeding based thereon it shall be reduced to and computed by the denominations given.”); MD. CTS. & JUD. PROC. CODE ANN. § 11-101 (1984) (“Except as otherwise provided by Law, a money judgment . . . rendered or imposed by any court of the State shall be expressed in dollars and cents.”); MONT. CODE ANN. § 25-9-203 (1983) (“In judgments, the amounts thereof must be computed and stated as near as may be in dollars and cents, rejecting fractions of a cent.”); S.C. CODE ANN. § 34-31-10 (Law. Co-op 1977) (“[T]he verdicts of all juries on all contracts . . . shall be expressed in dollars or units thereof . . . .”); TENN. CODE ANN. § 47-14-101 (1984) (“All verdicts and judgments shall be rendered in dollars and cents . . . .”); VT. STAT. ANN. tit 9, § 1 (1984) (“[T]his section shall not affect an account, charge or entry originally made or a contract expressed in other money of account, but the same shall be reduced to dollars and parts of a dollar in an action thereon.”).

The California statute falling within this grouping is in addition to a separate “money of account” statute, CAL. GOV’T CODE § 6850 (West 1980), which is similar to those discussed *infra* note 169. This suggests that the money of account statutes themselves should not be taken, without more, as requiring judgments in U.S. currency. Despite the apparently clear language of the Maryland statute, *supra*, an early Maryland Court of Appeals case upheld a judgment rendered in British sterling. *Purviance v. Neave*, 4 H. & McH. 199 (Md. 1798). However, in a later case, the Maryland Court of Appeals did not follow *Purviance*, ruling that “the court was not at liberty to disregard [the statute] and enter the judgment for money in other denominations than those prescribed.” *Marburg v. Marburg*, 26 Md. 8, 21 (1866).

168. ARK. STAT. ANN. § 29-115 (1947); NEV. REV. STAT. § 17.130 (1979); N.Y. JUD. LAW § 27 (McKinney 1983); WIS. STAT. § 138.03 (1974). The New York statute is a good example of these statutes. Its concluding language, that “no judgment, or other proceeding, shall be considered erroneous for such omissions,” seems to imply that the purpose of the statute may have been simply to avoid judgments in amounts including fractions of cents. It has been suggested that the fact that the definition of “money judgment” in the New York statutes is not limited to U.S. currency, N.Y. CIV. PRAC. LAW § 105(n) (McKinney 1972), the inclusion of foreign currency in the notion of “money” in the New York Uniform Commercial Code, N.Y. U.C.C. § 1-201(24) (McKinney 1964), the broad authorization to the state administrator to adopt an appendix of forms to the Civil Practice Law and Rules along with the lack of adoption of an official form of judgment, N.Y. CIV. PRAC. LAW § 107 (McKinney 1972), and the failure of the Civil Practice Law and Rules to restrict the content of judgments in any relevant respect, N.Y. CIV. PRAC. LAW § 5011 (McKinney 1963), all combine to be “sufficient to override an ancient, dubiously applicable statute.” Becker, *supra* note 11, at 157 n.25.

169. See *supra* notes 100-108 and accompanying text. IDAHO CODE § 28-42-401 (1980); LA. REV. STAT. ANN. § 1:53 (West 1973); MICH. COMP. LAWS ANN. § 438.1 (West 1978); MONT. CODE ANN. § 30-12-601 (1983); N.J. REV. STAT. § 51:2-1 (1970); N.M. STAT. ANN. § 56-8-1 (1978). Montana, in addition to its provisions listed, *supra* note 167, has a statutory provision which allows for any “account, charge or entry originally made or any note, bond, or other instrument expressed in any other money of account,” but then requires that “the same must be reduced to dollars and cents in any action.” MONT. CODE ANN. § 30-12-602 (1983).



## Foreign Currency Judgments

language of section 20 of the Currency Act of 1792 and, accordingly, do not clearly prevent a judgment from being rendered in a foreign currency. Finally, Virginia and West Virginia have nearly identical statutes specifically dealing with claims expressed in a foreign currency.<sup>170</sup> While these seemingly allow foreign currency judgments, the Virginia statute has been interpreted to require that the fact finder ultimately determine the value of the claim “in domestic money.”<sup>171</sup>

In taking the position that U.S. courts should be able to grant judgment in foreign currency, the Restatement does not consider the impact of the restrictive state statutes discussed above. While the Restatement may provide impetus for judicial development, it cannot repeal statutes requiring a home currency judgment. Consequently, in some states the first procedural step under *Miliangos*—a foreign currency judgment—appears at first glance to be unavailable.

Under the doctrine of *Erie Railroad Co. v. Tompkins*,<sup>172</sup> this same restriction would be applied by federal courts sitting in diversity in states with home currency judgment rules. In *Vishipco Line v. Chase Manhattan Bank, N.A.*,<sup>173</sup> the Second Circuit was faced with the choice between the New York breach date rule and the federal judgment date rule. Vietnamese corporations and a Vietnamese citizen brought a breach of contract action against Chase Manhattan for amounts on deposit in its Saigon branch, which was closed when Chase officials in New York determined that Saigon would fall. Plaintiffs’ deposits with the Saigon branch totalled 338,974,671 piastres,<sup>174</sup> and evidence showed an official exchange rate of 755 piastres to the dollar on the date of the bank’s closing.<sup>175</sup> On the date of judgment, however, the piastre was worthless. The decision whether the New York breach date rule or the federal judgment date rule should apply thus determined whether the plaintiffs would receive \$448,973 or nothing at all.

170. VA. CODE § 6.1-330.7 (1950); W. VA. CODE § 47-6-3 (1980). The Virginia statute includes a proviso that “as to any such suit involving an instrument to which § 8.3-107 of the [Virginia] Uniform Commercial Code is applicable, the provisions of that section shall apply.” For a discussion of the impact of U.C.C. § 3-107 on foreign currency judgments, see *infra* notes 199-203 and accompanying text.

171. *George Campbell Co. v. Angus*, 91 Va. 438, 22 S.E. 167, 168 (1895).

172. 304 U.S. 64 (1938).

173. 660 F.2d 854 (2d Cir. 1981).

174. *Id.* at 857.

175. *Id.* at 865.

After noting that "federal courts sitting in *non*-diversity cases have rather consistently adopted the judgment-day rule,"<sup>176</sup> the Second Circuit stated that, "this rule is substantive rather than procedural (there is no Federal Rule of Procedure on the subject) and therefore cannot be followed by federal courts sitting in diversity in states which apply the breach-date rule."<sup>177</sup> The application of the New York breach date rule was seen as "fulfilling 'the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.'"<sup>178</sup>

Although *Vishipco Line* stands for the proposition that state law governs on the issue of conversion date, it does not necessarily prevent a federal court sitting in a diversity case from applying a federal rule allowing judgment to be rendered in a foreign currency. As *Miliangos* made clear, the issue of whether judgment can be rendered in a foreign currency is separate from the issue of what exchange rate is applied if judgment is given in the home currency.<sup>179</sup> If a federal court faced with the issue of whether judgment can be given in a foreign currency decides, as did the House of Lords in *Miliangos*, that this question is one of procedure,<sup>180</sup> then federal law, rather than state law, should arguably control the result.<sup>181</sup>

A characterization of the rule as substantive or procedural, however, will not answer the question. Although Justice Reed, concurring in *Erie*, stated that "no one doubts federal power over procedure,"<sup>182</sup> since then "the *Erie* doctrine has been substantially redefined by the Supreme Court, and it is now clear that no simple dichotomy between substance and procedure will determine the issue of which state law is to control."<sup>183</sup> The *Guaranty Trust* case<sup>184</sup> introduced the "outcome-determi-

176. *Id.* (emphasis in original) (citing *Zimmerman v. Sutherland*, 274 U.S. 253 (1927); *Deutsche Bank filiale Nurenberg v. Humphrey*, 272 U.S. 517 (1926); *Conte v. Flota Mercante del Estado*, 277 F.2d 664 (2d Cir. 1960); and *Shaw, Savill, Albion & Co. v. The Fredericksburg*, 189 F.2d 952 (2d Cir. 1951)).

177. 660 F.2d at 865. Lord Wilberforce, in *Miliangos*, made reference to the importance of the substance-procedure dichotomy in the conflict of laws context in stating, "though English law (*lex fori*) prevails as regards procedural matters, it must surely be wrong in principle to allow procedure to affect, detrimentally, the substance of the creditor's rights." *Miliangos*, 1976 A.C. at 465.

178. 660 F.2d at 866 (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1968)).

179. *Miliangos*, 1976 A.C. at 461-64.

180. *Supra* note 177.

181. This position is further strengthened for a court sitting in New York because the controlling New York statute is part of the procedural rules set forth in the New York Judiciary Law, which was enacted in 1797. *See supra* note 168.

182. *Erie*, 304 U.S. at 92.

183. C. WRIGHT, *HORNBOOK ON THE LAW OF FEDERAL COURTS* 59 (4th ed. 1983).

184. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

## Foreign Currency Judgments

native” test to determine whether state or federal law should control. Under its guidelines, the ability to give judgment in a foreign currency, although not determinative of the liability claim itself, would certainly have a substantial impact on the judgment amount.<sup>185</sup> Moreover if, as suggested by *Miliangos*,<sup>186</sup> the ability to give judgment in a foreign currency is in the nature of the ability to award specific performance, there is precedent for the proposition that state law should govern as a substantive matter.<sup>187</sup>

If, contrary to the above characterization, a state rule were classified as procedural and non-outcome determinative, a Federal Rule of Civil Procedure would clearly supercede it.<sup>188</sup> The outcome is less clear, however, where the only rule on the issue is a state statute. In promoting the “discouragement of forum-shopping and avoidance of inequitable administration of the laws,”<sup>189</sup> the court in such a case should balance the competing state and federal interests, as suggested by the Supreme Court in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*<sup>190</sup> A strong argument can be made that in matters of foreign commerce the federal interest merits a rule to be applied consistently in all federal courts.<sup>191</sup>

185. See, e.g., *supra* notes 173-78. See also Becker, *supra* note 11, at 158 n.31 (“Of course, in pre-*Hanna* terms, the question whether the plaintiff will recover the foreign currency equivalent of, say, \$50,000 or \$75,000 involves an issue that is ‘substantive’ and ‘outcome’ determinative.”).

186. *Miliangos*, 1976 A.C. at 467-68.

187. See, e.g., *Weathersby v. Gore*, 556 F.2d 1247, 1257-59 (5th Cir. 1977).

188. See *Hanna v. Plumer*, 380 U.S. 460, 469-70 (1965). The federal court can refuse to apply the federal rule “only if the Advisory Committee, this [Supreme] Court, and Congress erred in their prima facie judgment that the Rule in question transgressed neither the terms of the Enabling Act nor constitutional restrictions.” *Id.* at 471. It has been suggested that in the *Hanna* context, § 20 of the Currency Act of 1792 “may be regarded as a declaration of federal court law that need not bow to a contrary state rule.” Becker, *supra* note 11, at 158 n.31. However, the lack of any clear provision on the matter in the Federal Rules of Civil Procedure, combined with the 1982 revision and restatement of this provision make this position weak at best.

189. *Hanna*, 380 U.S. at 468.

190. 356 U.S. 525 (1958). See, e.g., cases cited in C. WRIGHT, *supra* note 183, § 59, n.55.

191. This interest was highlighted in Justice Story’s opinion in *Swift v. Tyson*, when he emphasized the need for uniformity in federal courts on questions of general commercial law, dependent not on “the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.” 41 U.S. (16 Pet.) 1, 19 (1842). In quoting Cicero, he declared that “[t]he law respecting negotiable instruments” cannot be one thing in Rome and another in Athens. *Id.* Some time earlier Justice Story had used the same quotation from Cicero to apply to “this great system of maritime law.” *DeLovio v. Boit*, 7 F. Cas. 418, 443 (C.D. Mass. 1815) (No. 3776). Even though the principal legal impact of *Swift v. Tyson* is considered by most to have been erased by *Erie* and its progeny, the concept that commercial law should develop uniformly retains its strong supporters and lends justification to the argument favoring a federal rule on foreign currency judgments under the *Erie* doctrine. See, e.g., Berman & Kaufman, *The Law of International Commercial Transactions*, 19 HARV. J. INT’L L. 221 (1978), updated and reprinted in III A LAWYER’S GUIDE TO INT’L BUS. TRANSACTIONS, Folio 3 (W. Surrey & D. Wallace eds. 1983). For a further example of the application

Indeed, regardless of the "substantive" or "procedural" characterization, the need for a uniform foreign currency judgment rule may compel its development as a matter of federal common law. The signature of the United States to the United Nations Convention on Contracts for the International Sale of Goods<sup>192</sup> arguably makes disputes regarding international commercial contract issues "concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community [which therefore] must be treated exclusively as an aspect of federal (common) law."<sup>193</sup> The development of transnational consistency in the post-*Miliangos* changes in commercial law on this subject makes it an area appropriate for inclusion in the development of federal common law. The issue would then become subject to federal question jurisdiction, as it would be "arising under" federal common law. Since both state and federal courts would be following the "federal" rule, the confusion of the *Erie* doctrine could be avoided.<sup>194</sup>

Although the Supreme Court has stated that federal common law is appropriate in only a "few restricted" instances,<sup>195</sup> it has also stated that "[i]n these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control."<sup>196</sup> Foreign currency judgments are thus peculiarly appropriate for treatment as a matter of federal common law, implicating as they do U.S. interests in free trade and international comity.

of the federal (common) law merchant, see *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

192. U.N. Conference on Contracts for the International Sale of Goods, Final Act (April 10, 1980), U.N. Doc. A/Conf. 97/18, reprinted in 19 I.L.M. 668 (1980).

193. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964).

194. *Illinois v. Milwaukee*, 406 U.S. 91 (1972). See C. WRIGHT, *supra* note 183, § 60. Such a development would unify state law because federal common law is binding on both state and federal courts. *Free v. Bland*, 369 U.S. 663 (1962); see also *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964). A complete discussion of the federal common law as it applies to commercial transactions is beyond the scope of this Article. In matters of federal question jurisdiction, and in diversity actions in all but the eighteen states with statutes discussed at *supra* notes 165-71, no prohibition on giving judgment in a foreign currency appears to exist legitimately. In those states with statutes arguably prohibiting foreign currency judgments, however, short of repeal or amendment, a federal common law approach is one possibility available for constructive change. For a more complete discussion of federal common law, see 19 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4515 (1982); M. REDISH, *FEDERAL JURISDICTION* 84-107 (1980).

195. *Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)).

196. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

## Foreign Currency Judgments

Additionally, the adoption of the Uniform Commercial Code by all fifty states<sup>197</sup> has made the home currency judgment rule an anomaly as a matter of state law. Although none of the Article 2 sales provisions addresses the issue of payment or judgment in a foreign currency, many of the Code's other provisions dictate allowance of a foreign currency judgment. Section 1-201(24), for example, defines "money" expansively as "a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency."<sup>198</sup> Sections 3-104 and 3-107 include foreign currency obligations in the definition of negotiable instruments. Notably, Section 3-107(2) provides in part that "[i]f such an instrument specifies a foreign currency as the medium of payment, the instrument is payable in that currency."<sup>199</sup> Together, the provisions require that a debt in a foreign currency be repaid in that currency and are thus inconsistent with a home currency judgment rule.<sup>200</sup>

Indeed, the U.C.C. provisions have been so interpreted in New York. When the U.C.C. was being considered in New York, the New York Clearing House Association objected to the adoption of section 3-107 on the grounds that it would require a foreign currency judgment inconsistent with federal and New York law.<sup>201</sup> The provision was dropped, and the New York U.C.C. now permits enforcement of a foreign currency claim only in U.S. dollars.<sup>202</sup> The inclusion of the provision in the commercial codes of other states dictates the contrary result, to wit, that a foreign currency judgment is available. It is anomalous to have a statute

197. The jurisdictions enacting the U.C.C. and the dates of enactment are listed in 1 U.L.A. Supp. 1 (Supp. 1985). Louisiana has adopted only Articles 1, 3, 4, 5, 7 and 8. *Id.*

198. U.C.C. § 1-201(24) (1977).

199. U.C.C. § 3-107(2) (1977). The full text of this paragraph, as adopted in all states but New York, states:

(2) A promise or order to pay a sum stated in a foreign currency is for a sum certain in money and, unless a different medium of payment is specified in the instrument, may be satisfied by payment of that number of dollars which the stated foreign currency will purchase at the buying sight rate for that currency on the day on which the instrument is payable or, if payable on demand, on the day of demand. If such an instrument specifies a foreign currency as the medium of payment the instrument is payable in that currency.

In New York, the final sentence of this provision was deleted. N.Y. U.C.C. § 3-107 (McKinney 1965). See Penney, *New York Revisits the Code: Some Variations in the Enactment of the U.C.C.*, 62 COLUM. L. REV. 992, 997 (1962).

200. The U.C.C. adopts "the position that an instrument expressing the amount to be paid in sterling, francs, lire or other recognized currency of a foreign government is negotiable even though payable in the United States." U.C.C. § 3-107, comment 1 (1977). In the terms of the English courts, this allows both the money of account and the money of payment on a negotiable instrument to be in a foreign currency, even though governed by U.S. law. See *supra* note 16. As such, it seems somewhat anomalous that, in an action to enforce the payment obligation on such an instrument, a court could not render judgment for the amount promised.

201. NEW YORK CLEARING HOUSE ASS'N, REPORT ON THE UNIFORM COMMERCIAL CODE (1961) quoted in Penney, *supra* note 199, at 997.

202. N.Y.U.C.C. § 3-107 (McKinney 1965); but see *supra* note 168.

which provides for instruments payable in a foreign currency if such instruments are not enforceable in those terms in the courts.<sup>203</sup>

In the absence of the development of federal common law, state and federal courts may take guidance from the Practice Direction promulgated by the English Supreme Court following the *Miliangos* decision.<sup>204</sup> Under Paragraph 5 of the Practice Direction, a judgment may be issued in the home currency but has the effect of a foreign currency judgment through the use of the following paragraph:

It is this day adjudged that the Defendant do pay the Plaintiff (*state the sum in foreign currency for which the Court has ordered judgment to be entered*) or the Sterling equivalent at the time of payment and £. . . . costs (or costs to be taxed).<sup>205</sup>

Thus even if a state statute is interpreted as requiring that judgment be expressed in U.S. dollars, the judgment could take into account the plaintiff's expectations for a foreign currency recovery. The form of the judgment could be similar to the following:

It is this day adjudged that the Defendant pay the Plaintiff the amount in U.S. dollars, dimes and cents which shall be the equivalent of (here state the sum in foreign currency as found due by the court) at the time of payment.<sup>206</sup>

203. To date the only cases which appear to have interpreted U.C.C. § 3-107 have been in the New York courts. *Lausen v. Federman*, 9 U.C.C. Rep. Serv. 866 (N.Y. Sup. Ct. 1971); *Weston Banking Corp. v. Turkiye Garanti Bankasi A.S.*, 86 A.D.2d 544, 446 N.Y.S.2d 67, 69-70 (App. Div. 1982). As such, the final sentence of § 3-107(2) has not been considered by the courts. Both of the New York cases converted the foreign currency debt to U.S. dollars at the breach date rate of exchange. The *Lausen* opinion specifically cited § 3-107(2) as authority for selecting the breach date exchange rate. *Lausen, supra*, at 867. Section 3-107(2) does state that a negotiable instrument payable in a foreign currency "may be satisfied by payment of that number of dollars which the stated foreign currency will purchase at the buying sight rate for that currency on the day on which the instrument is payable." However, in a time of rapidly fluctuating exchange rates it works an injustice to interpret a statute which allows for payment at the due date exchange rate if payment is made on the due date to require payment at the due date rate of exchange if payment is not made until after a lengthy court proceeding.

204. Practice Direction, [1976] 1 All E.R. 669; [1976] 1 W.L.R. 83.

205. *Id.* at 669, [1976] 1 W.L.R. at 84 (emphasis in original).

206. This is similar to the recommendation of the British Columbia Law Reform Commission in dealing with the Canadian federal statute which has been interpreted to require that Canadian judgments be expressed in Canadian currency. See LAW REFORM COMMISSION, *supra* note 85, at 60. The Commission there suggests that the judgment "should be comparable to" the following language:

THIS COURT ORDERS that the defendant(s) \_\_\_\_\_ pay to the plaintiff (s)

(i)(state the sum in foreign currency in which judgment has been ordered to be entered) and

(ii)(interest as claimed or, interest pursuant to the Court Order Interest Act)

or the equivalent, at the time of payment, in Canadian currency, and costs to be taxed.

*Id.* The same result is reached by application of the recently-enacted Ontario statute, *supra* note 186.

## Foreign Currency Judgments

Such a statement of the judgment would merely constitute recognition of a long-standing principle of contract law that a sum due in a foreign currency may be satisfied at the option of the debtor, by tender of the equivalent sum, determined at the time of payment in the local currency.<sup>207</sup> The judgment would be rendered in the home currency, but would reflect the amount due in the foreign currency, which would be the more appropriate currency for expression of the liability.<sup>208</sup> By stating the judgment in this manner, the court could both respect the state statute involved and provide for the expression of a foreign currency liability in a manner consistent with that in which the liability was incurred.

### C. *Providing Proper Compensation for Damages Suffered*

The adoption of a foreign currency judgment rule, without more, will not resolve the issue of the appropriate damages to be awarded the successful plaintiff. In fact, a pure foreign currency judgment rule could provide results as inequitable as those possible under the home currency judgment rule.

Because the rules currently applied in the United States do not always promote the objectives of compensating the plaintiff for reasonably foreseeable economic loss and avoiding the unjust enrichment of the defendant, they guarantee neither certainty nor equity. One of the criticisms of the English Law Commission's Working Paper which followed *Miliangos* was that its analysis was "premised upon the belief . . . that the injustice of the traditional rules is self-evident and the reforms are to be welcomed."<sup>209</sup> If change is to be suggested in the United States, we too must first demonstrate the need for that change and propose a rule which provides improved results.

Although selecting a single conversion date may provide some degree of certainty for litigants when a home currency judgment is required, it will not provide a just result in every case.<sup>210</sup> Underlying the rationale in most cases is the natural reaction that any risk of depreciation should be

207. See, e.g., U.C.C. § 3-107(2); A. NUSSBAUM, *supra* note 11, at 371; F. MANN, *supra* note 11, at 312. This is the form used in the French courts. See A. NUSSBAUM, *supra* note 11, at 374.

208. There is U.S. precedent for language which in fact states the amount of the judgment in the foreign currency and then sets a date for conversion. *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1, 14 (S.D.N.Y. 1973) ("There will be judgment in favor of Curacao against Solitron for 445,682.35 Netherlands Antilles guilders, to be converted into United States dollars at the rate prevailing on the date of judgment . . .").

209. Bowles & Whelan, *Law Commission Working Paper No. 80 Private International Law Foreign Money Liabilities*, 45 MOD. L. REV. 434 (1982).

210. See, e.g., text and chart accompanying note 11.

on the wrongdoer. "[I]n general, courts have endeavored to select the rule that, in a given case, will prevent the loss from fluctuation of exchange rates from being borne by the injured or non-breaching party."<sup>211</sup> This approach acknowledges that the injured party was harmed not only by the breach or the tort itself, but further by not being compensated for the injury immediately and thereby being subjected to the risks of exchange rate fluctuations which were not allocated by agreement. As the British have found, the breach date rule will not serve well when the home currency is comparatively weak during the period in question. Similarly, a judgment date rule (or even a strictly applied payment date rule) will create unfairness when the home currency is the stronger of the currencies involved.

Lord Denning may have been correct in 1961 when he stated that "[s]o long as sterling is regarded as stable whilst other currencies go up and down, it would seem that justice is best done by taking the rate of exchange at the date of breach."<sup>212</sup> However, the application of the same rule in *The Teh Hu*, when sterling was the weak currency, led to concern for unfairness in the treatment of the injured party.<sup>213</sup> By the time *Miliangos* arose, the House of Lords refused to continue the sterling judgment breach date rule where the plaintiff would have suffered from the currency fluctuation during the period from the date of injury until payment of the judgment.<sup>214</sup> Despite language to the contrary,<sup>215</sup> the *Miliangos* opinion now clearly stands for the policy that an innocent party should not bear the burden of exchange rate fluctuations occurring after the breach and over which neither party had any control.

Like the House of Lords in *Miliangos*, U.S. courts have had problems with the home currency judgment breach date rule where the home currency has been the weaker of the two currencies involved. In *In re Good Hope Chemical Corp.*,<sup>216</sup> the First Circuit, in a bankruptcy case, chose the breach date exchange rate, but determined the date of breach to be the date on which the bankruptcy court allowed the rejection of the contract, rather than the much earlier date on which the bankruptcy petition

211. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 823, Reporter's Note 4 (Tent. Draft No. 6, 1985).

212. *Re United Railways of Havana and Regla Warehouses Ltd.*, 1961 A.C. 1007, 1069.

213. [1970] P. 106 (C.A.). For a discussion of the case, see *supra* notes 33-34 and accompanying text.

214. *Miliangos*, 1976 A.C. at 469.

215. *Id.* at 465, 474-76, 497 (rejecting the application of the maxim *cessante ratione cessat ipsa lex* ("the reason for the law ceasing, the law itself ceases") as a justification for departure from the sterling breach date rule).

216. 747 F.2d 805 (1st Cir. 1984).



## Foreign Currency Judgments

was filed.<sup>217</sup> The result was that, in a case where the judgment date rule would have favored the plaintiff, the court felt compelled to follow the breach date rule, but tempered any inequity by determining that the date of breach was a date nearer the date of judgment.

Just as U.S. courts have stretched to accommodate the plaintiff in applying the breach date rule to cases where the foreign currency has been strong, courts faced with a strong dollar have stretched to apply the breach date rule and avoid the judgment date rule whenever possible.<sup>218</sup> The rationale given by Justice Holmes for the judgment date rule was that “[a] suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here.”<sup>219</sup> Neither should the obligation be diminished by that fact. If the purpose of the choice of law analysis is, at least in part, to prevent international forum shopping, then a judgment in a U.S. court should be for the same amount as a judgment in any other court which might have jurisdiction over the parties.

Not only are the breach date and judgment date rules inadequate when taken separately, but they remain inadequate when a court distorts the language of prior cases in order to provide itself with the benefit of whichever of the two it might prefer to choose. If the truly equitable course is to award the plaintiff the same number of units of a foreign currency as contained in the original obligation, then the payment date, and neither the judgment date nor the breach date, is the appropriate date if conversion is required. It is misleading to contort the process to reach the judgment date result when what the court prefers is payment date effect. Setting any one date as that required for conversion can never result in a rule which will be evenly applied by the courts in all cases. Although Justice Holmes’ choice of law rationale carries with it a sense of neat legal symmetry, the fact is that it too has not been applied evenly by the courts and simply is not a fair rule in all cases. Two contracts for exactly the same amount, expressed in exactly the same currency, when breached, could produce entirely different results simply because the place of payment or the law chosen to govern the contracts differed.

As inequitable as the home currency judgment conversion date rules can be, a foreign currency judgment rule is no better unless it takes into

217. *Id.* at 812-13.

218. *See, e.g.,* *Compania Engraw Commercial E. Industrial S.A. v. Schenley Distillers Corp.*, 181 F.2d 876, 879 (9th Cir. 1950).

219. *Die Deutsche Bank filiale Nurenberg v. Humphrey*, 272 U.S. 517, 519 (1926).

account the true nature of the damages suffered. Although a pure foreign currency judgment rule avoids the problematic issue of determining an appropriate conversion date, its rigid application will fairly compensate the successful plaintiff only in times of a weak home currency. Such a rule is no more than a rigid home currency judgment rule combined with a mandatory payment date conversion rate. The *Miliangos* rule in England has been interpreted by some to require this result.<sup>220</sup> Although this rule will be fair so long as sterling remains weak, in periods of a strong pound it will be as unfair as the sterling judgment breach date rule has been in times of a weak pound.

The new Restatement rule appears at first to avoid the problems of a rigid foreign currency judgment rule. It gives the plaintiff the option of seeking judgment either in the foreign currency, if it is "the currency in

220. The *Miliangos* decision and the events leading up to it were driven in large part by the declining value of sterling as compared to other major currencies. However, in its rush to develop a rule which protects a creditor (or any other prevailing party) in times of a weak home currency, the English courts may have set up a rule that will be equally problematic if and when sterling once again becomes the stronger of the two currencies involved. The Report of the Law Commission speaks of a "completely new principle governing the treatment by the courts of foreign-currency obligations," and notes that the foreign currency will be the currency of judgment in appropriate cases, "for good or ill." Law Commission Report No. 124, *supra* note 155, at ¶ 25 (emphasis in original). It later states that "to allow the plaintiff to seek judgment in sterling in the case of a foreign-currency claim would be contrary to the principle in *Miliangos*," and concludes that "[a] plaintiff should not be able to obtain judgment in sterling in the case of enforcement of a claim which ought properly to be expressed in a foreign currency." *Id.* at ¶¶ 3.9, 3.11.

The courts and commentators have not made this position so clear. The Practice Direction adopted immediately after *Miliangos* left the issue unresolved. Practice Direction, [1976] 1 All E.R. 669. In *Federal Commerce v. Tradax Export S.A.*, Lord Denning indicated that the plaintiff has no option when he stated, "[o]nce it is recognised that judgment can be given in a foreign currency, justice requires that it should be given in every case where the currency of the contract is a foreign currency." [1977] 2 All E.R. 41, 51 (C.A.) (emphasis in original). In *Barclays Bank Int'l v. Levin Bros. (Bradford) Ltd.*, Judge Mocatta seemed to take a more flexible approach, rejecting the argument that "where the obligation in the contract is expressed in terms entitling the creditor to a sum expressed in a foreign currency, judgment must . . . be given in that currency." [1976] 3 All E.R. 900, 909 (Q.B.). A position somewhere in the middle was taken by Judge Donaldson in *Ozalid Group (Export) Ltd. v. African Continental Bank Ltd.*, when he stated that "under the new rule the plaintiff is entitled to make his claim in foreign currency," but not "required" to do so. [1979] 2 Lloyd's L.R. 231, 233-34 (Q.B.) (emphasis in original). Justice Donaldson would not give the plaintiff a free choice, but rather leave it to the plaintiff, "to select the currency in which to make his claim and . . . to prove that an award or judgment in that currency will most truly express his loss and accordingly most fully and exactly compensate him for that loss." *Id.* at 234; see also Law Commission Report No. 124, *supra* note 155, ¶ 39, n.171. A leading commentator has accepted the mandatory nature of foreign currency judgments after *Miliangos*, but tempered the effect of such a rule by calling for the adoption of "a sound rule permitting the recovery of damages for the loss caused by the depreciation of foreign money." F. MANN, *supra* note 11, at 348. Other commentators would apply a more flexible interpretation of the *Miliangos* rule, allowing the plaintiff to receive judgment in sterling when it was the stronger currency, thus apparently offering an option similar to that contemplated by the Revised Restatement § 823. See Bowles & Whelan, *supra* note 209, at 440-41 (1982).

## Foreign Currency Judgments

which the obligation is denominated or the loss was incurred,” or in United States dollars.<sup>221</sup> If the court gives judgment in U.S. dollars on a foreign currency obligation, “conversion is to be made at such rate as to make the creditor whole and to avoid rewarding a debtor who has delayed in carrying out the obligation.”<sup>222</sup> The plaintiff is given the benefit of the most favorable rate of exchange, but is limited to the breach date and judgment date rates.<sup>223</sup> The result is little better than the rigid payment date equivalent which may exist in England. Even worse, it retains the unnecessary breach date judgment date argument. Freed of the restraints of granting judgment in the home currency, the courts should reject the resulting conversion date rules and the artificial distinctions upon which they rest. Only then will the courts be able to adopt a rule consistent with the basic principles of damages in both tort and contract law—that the injured party receive full compensation for losses actually suffered.<sup>224</sup>

### V. Structuring The Change

#### A. *The Restatement Alternative*

The draft of Revised Restatement section 823 recognizes that, without more, a strict rule requiring judgment in a foreign currency would be no more appropriate than a rule always requiring judgment to be in U.S. dollars. The entire section reads as follows:

§ 823. *Obligations in Foreign Currency: Law of the United States*

(1) Courts in the United States ordinarily give judgment on causes of action arising in another state, or denominated in a foreign currency, in United States dollars, but they are not precluded from giving judgment in the currency in which the obligation is denominated or the loss was incurred.

(2) If the court gives judgment in dollars in accordance with Subsection (1), the conversion is to be made at such rate as to make the creditor whole

221. See *supra* note 95.

222. *Id.* § 823(2).

223. “If the foreign currency has depreciated since the injury or breach, judgment should be given at the rate of exchange applicable on the date of injury or breach; if the foreign currency has appreciated since the injury or breach, judgment should be given at the rate of exchange applicable on the date of judgment or the date of payment.” *Id.* § 853, comment c. This position would not in all cases be consistent with the earlier statement in the same comment that, “[n]either party should receive a windfall nor be penalized as a result of currency conversion.” *Id.*

224. See C. McCORMICK, *supra* note 91, § 49; 5 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1338 (rev. ed. 1937); W. PROSSER & W. KEETON, THE LAW OF TORTS § 2, at 7 (5th ed. 1984); U.C.C. § 3-107(2); A. NUSSBAUM, *supra* note 11, at 371; F. MANN, *supra* note 11, at 312.

and to avoid rewarding a debtor who has delayed in carrying out the obligation.<sup>225</sup>

Unlike the *Miliangos* rule, which has been interpreted by the British Law Commission to *require* that judgment now be in foreign currency in similar fact situations,<sup>226</sup> the Restatement rule would give the plaintiff the option of having judgment either in the foreign currency or in U.S. dollars.<sup>227</sup>

By allowing the plaintiff to select the currency of judgment, the Restatement rule fails to deal adequately with the problems of the current rules. U.S. cases have followed the application of the home currency judgment rule either with a finding that precedent requires conversion on a specific date,<sup>228</sup> or with a conviction that the risk of devaluation should be placed on the wrongful party.<sup>229</sup> In those jurisdictions taking the former of these two approaches, the Restatement rule will require the plaintiff to face the possibility of either opting for judgment in the foreign currency (which may in fact have depreciated against the dollar during the period in question) or judgment in U.S. dollars with conversion at an exchange rate which may still be detrimental to the plaintiff. In either case, where the U.S. dollar is the stronger of the two currencies, the plaintiff will be inclined to request judgment in dollars, with the result being that the Restatement rule will solve none of the problems of the existing law and place the court right back where it would have otherwise been in dealing with the problem of determining the appropriate conversion date.<sup>230</sup> Allowing the plaintiff to dictate either a pure foreign currency judgment rule (the equivalent of a payment date rate of exchange under the current home currency judgment rule) or a home currency judgment rule (with the accompanying problems of existing case

225. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 823 (Tent. Draft No. 6, 1985).

226. See *supra* note 220.

227. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 823, comment c (Tent. Draft No. 6, 1985) ("A judgment in foreign currency should be given only on the request of the creditor . . .").

228. See, e.g., *Cronel Watch, S.A. v. Peterson State Bank*, 565 F. Supp. 259, 262 (N.D. Ill. 1983).

229. See, e.g., *Jamaica Nutrition Holdings, Ltd. v. United Shipping Co., Ltd.*, 643 F.2d 376 (5th Cir. 1981).

230. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 823, comment c (Tent. Draft No. 6, 1985):

If the court gives judgment in U.S. dollars, as is the general practice, the date used for conversion should depend on whether the currency of obligation has appreciated or depreciated relative to dollars. If the foreign currency has depreciated since the injury or breach, judgment should be given at the rate of exchange applicable on the date of injury or breach; if the foreign currency has appreciated since the injury or breach, the judgment should be given at the rate of exchange applicable on the date of judgment or the date of payment.

## Foreign Currency Judgments

law) does little to eliminate the problems the rule is meant to address. It merely adds the payment date to the list of conversion dates available, giving the plaintiff the choice of the most favorable conversion date.

In addition to retaining the current problem of determining whether the breach date or judgment date is appropriate when judgment is rendered in U.S. dollars, the Restatement rule fails to address the time when a plaintiff is allowed to exercise the option of selecting the currency of judgment. A plaintiff should not be held to its best guess at the time initial pleadings are filed as to the foreign currency market over the course of the coming litigation.

By stating flatly that courts in the United States are “not precluded from giving judgment in the [foreign] currency,” section 823 also ignores completely the problems of state courts and federal courts exercising diversity jurisdiction in those states having statutes which may be interpreted to require dollar judgments.<sup>231</sup> Given that major trading states, including New York, California, and Louisiana,<sup>232</sup> have such statutes, this concern must be addressed.

Finally, the Revised Restatement rule does not directly address the important question of pre-judgment and post-judgment interest on a foreign currency judgment.<sup>233</sup> Because exchange rate fluctuations can represent, at least in part, the difference in the interest rates offered on the two currencies involved, the application of a U.S. interest rate to a judgment rendered in a foreign currency would produce an anomalous result.<sup>234</sup> Both British and U.S. courts have rendered judgments recognizing this fact.<sup>235</sup> An appropriate rule must provide that interest will be granted at the rate applicable to the currency of the judgment, within the constraints of the procedural rules applicable in the jurisdiction involved.

231. *See supra* notes 166-71 and accompanying text.

232. *See supra* notes 167-69 and accompanying text.

233. This issue is indirectly addressed in comment e to § 823, where it is stated:

The date for commencement of interest on an obligation or a judgment is determined by the law of the forum, including its rules of conflict of laws. When a statutory rate of interest is applicable in the forum, that rate must be applied, even if the judgment is given in a foreign currency. If no statutory rate of interest is applicable, the court may, in appropriate cases, order interest to be based on the interest rate applicable at the principal financial center of the state issuing the currency in which the judgment is payable.

RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 823, comment e (Tent. Draft No. 6, 1985). *See also supra* note 230.

234. *See supra* notes 154-58 and accompanying text.

235. *Id.*

### B. *An Alternative To The Restatement*

Although Section 823 of the Draft Revised Restatement represents a substantial improvement over existing case law, a better rule is possible. The following alternative is suggested:

§ 823. *Obligation in Foreign Currency: Law of the United States*

(1) Courts in the United States may give judgment on causes of action arising in another state, or denominated in a foreign currency, in U.S. currency, in foreign currency, or in an amount in U.S. currency which is the equivalent of the amount of the obligation in the foreign currency at the time of payment.<sup>236</sup>

(2) Courts should give judgment in the most appropriate currency, taking into consideration:

(a) the currency in which the obligation is denominated, if any ("currency of account/payment");

(b) the currency in which the loss was incurred ("expenditure currency");

(c) the currency used by the plaintiff to make payment for the loss when it occurred ("plaintiff's currency"); and

(d) The foreseeability of loss in a particular currency.

(3) If the currency in which judgment is given pursuant to subsections (1) and (2) has depreciated in value as compared to another currency which is related to the cause of action, a court may, in appropriate circumstances, award damages for the loss caused by the depreciation of the judgment currency.<sup>237</sup>

(4) In giving judgment on a foreign currency obligation, a court may award both pre-judgment and post-judgment interest at such rate or rates as shall be appropriate, taking into consideration the statutory rate of interest, if any, otherwise applicable and the rate of interest generally available in the market on investments made in terms of the currency in which judgment is rendered.

This alternative would avoid the problems of the current version of section 823. The last clause of subsection (1) would recognize the existence of state statutes that create problems in granting judgment directly in a foreign currency.<sup>238</sup> It would afford greater consistency of result in all jurisdictions by providing that, in those jurisdictions without limitation, judgment could be rendered in foreign currency and, in those jurisdictions having statutory limitations, judgment could be rendered in terms of the U.S. dollar equivalent of the foreign currency amount at the payment date rate of exchange.

236. Compare Ontario Courts of Justice Act, *supra* note 85, § 131(1). See also *supra* note 206.

237. Compare Ontario Courts of Justice Act, *supra* note 85, § 131(3).

238. See *supra* notes 164-71 and accompanying text.

Subsection (2) of the proposed alternative would not provide the plaintiff with an unfettered choice in determining the currency of judgment. It would allow a court to render judgment in the foreign currency only when appropriate and not simply to comply with the plaintiff's request. Although this is contrary to the interpretation of *Miliangos* provided by the British Law Commission,<sup>239</sup> it is consistent with the position taken in English cases and commentaries subsequent to *Miliangos*.<sup>240</sup>

Subsection (3) addresses the problems of the current system of application of the breach date and judgment date rules. The courts in various U.S. jurisdictions are often uncertain as to which rule to apply.<sup>241</sup> However, there is a consistent attempt to prevent the breaching or tortious party from benefiting from any currency fluctuation.<sup>242</sup> If the choice of currency pursuant to subsection (2) means the plaintiff would otherwise suffer a post-breach or post-injury loss resulting from the fluctuation of exchange rates, the court could address this loss directly through the rule of subsection (3), rather than indirectly by hiding compensation for the loss through a distortion of the breach date and judgment date analysis as often occurs now.

The compensation allowed by subsection (3) may at first appear to present problems when placed against well-established rules regarding damages. This is particularly so in a contract case where the breach consists of the failure to pay an amount of money when due. In the 1881 Supreme Court case of *Loudon v. Taxing Dist. of Shelby County*,<sup>243</sup> the city of Memphis failed to make timely payment to a contractor and the contractor was forced to borrow at extremely high rates in order to continue work. In refusing to award the contractor damages for the extraordinary interest and for discounts on securities sold to raise the necessary money to continue work, Chief Justice Waite set down the rather blunt rule that

all damages for delay in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. The law assumes that interest is the measure of all such damages.<sup>244</sup>

Williston has recognized the firmness of this rule where only a single currency is involved:

239. See *supra* note 220.

240. *Id.*

241. See *supra* notes 135-37 and accompanying text.

242. See *supra* note 137 and accompanying text.

243. 104 U.S. 771 (1881).

244. *Id.* at 774.

Where the defendant is under a unilateral or independent obligation to pay a liquidated sum of money, the ordinary measure of damages for non-performance is the sum of money itself with interest at the legal rate from the time when it was due. In an action by a creditor against his debtor for the non-payment of the debt, no other damages are ever allowed.<sup>245</sup>

This rule of damages, if carried over to a foreign currency liability, would appear to prevent a court from granting judgment for the amount due, plus interest, plus an adjustment for exchange rate fluctuation. However, courts have indirectly reached the same result by working such recovery into the selection of either the breach date or judgment date rate of exchange. Even Williston, despite his strident support for the principle of nominalism when the forum currency is involved, recognizes the unique circumstances existing when the subject is a foreign currency claim.<sup>246</sup> In making this distinction, Williston quotes heavily from the Third Circuit decision of *Krauss v. Greenbarg*,<sup>247</sup> which, although not a foreign currency liability case, allowed consequential damages based upon the rule that, "knowledge of facts which makes special damages foreseeable imposes liability therefore."<sup>248</sup> Thus, Williston has at least indirectly recognized a claim for consequential damages in the form of compensation for losses due to currency exchange rate fluctuation.<sup>249</sup>

The issue of nominalism was faced squarely by the British Law Commission when it recognized the "long-established principle that (apart from any question of interest) in general only nominal damages are recoverable for failure to pay money."<sup>250</sup> After noting judicial and academic criticism of the rule, and judicial exceptions which had been carved out, the Law Commission went on to suggest that "the rule does not apply where substantial damages are within the contemplation of the parties."<sup>251</sup> For this proposition, the Law Commission referred to

245. 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1410 (3d ed. 1968).

246. *Id.* § 1410A.

247. 137 F.2d 569 (3d Cir. 1943).

248. *Id.* at 571.

249. This conclusion is open to dispute as not having been explicitly stated in 11 S. WILLISTON, *supra* note 245, § 1410A. Rather than discussing the application of the foreseeability concept to foreign currency claims, Williston follows the discussion of the *Krauss* case with a review of the U.S. cases adopting the breach date and judgment date exchange rules. However, the consequential damages position is further supported in a closely-related section, in which the firm rule of § 1410 is tempered by the recognition that, "special consequential damages arising after the breach are recoverable." *Id.* § 1413.

250. Law Commission Report No. 124, *supra* note 155, ¶ 2.34 (citing *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*, [1893] A.C. 429).

251. *Id.* The European Convention on Foreign Money Liabilities extends this principle even further by recognizing "the principle that the debtor who fails to pay at the proper time is liable to make good the prejudice which the creditor may suffer as a result of depreciation, however slight, of the money of account in relation to the money of the place of payment,



## Foreign Currency Judgments

which occurs after the proper date for payment.” COUNCIL OF EUROPE, EXPLANATORY REPORT ON THE EUROPEAN CONVENTION ON FOREIGN MONEY LIABILITIES 10 (1968) (emphasis added). The European Convention takes an approach similar to that suggested here:

### Article 1

1. A sum of money due in a currency which is not that of the place of payment may be paid in the currency of the place of payment, unless a different intention of the parties appears, or a different usage is applicable.
2. The debtor may not avail himself of this option if he knows or ought to know that payment in the currency of the place of payment would involve for the creditor a substantial prejudice.

### Article 2

If a sum of money is due in a currency other than that of the place of payment, the creditor may, if the debtor is unable, or alleges his inability, to make settlement in that currency, require payment in the currency of the place of payment.

### Article 3

If, in accordance with Article 1 or 2, the debtor pays in the currency of the place of payment, the conversion shall be effected at the rate of exchange at the date of actual payment.

### Article 4

1. If the debtor does not pay at the date of maturity and if after such date the currency in which the sum of money is due depreciates in relation to the currency of the place of payment, the debtor, whether he pays in the currency due or in the currency of the place of payment as provided in the preceding Articles, shall pay an additional amount equivalent to the difference between the rate of exchange at the date of maturity and the date of actual payment.
2. Nevertheless, the above-mentioned additional amount shall not be payable to the extent that the inability of the debtor is due to default of the creditor, or to *force majeure*, or the creditor has not suffered loss resulting from the depreciation. The debtor bears the burden of proof.
3. The provisions of paragraph 1 do not in any way limit other rights which the creditor may be in a position to claim from the debtor.

### Article 5

In the event of any proceedings for the recovery of a sum of money expressed in a currency other than that of the forum, the creditor may, at his choice, demand payment in the currency to which he is entitled or the equivalent in the currency of the forum at the rate of exchange at the date of actual payment.

### Article 6

Article 4 remains applicable even if during proceedings instituted in conformity with Article 5, the currency in which the sum of money is due depreciates in relation to the currency of the place of payment.

### Article 7

1. If a judgment entitles the creditor either to a sum of money in a currency other than that of the forum or the equivalent of such a sum in the currency of the forum, and a depreciation of the currency other than that of the forum in relation to that of the forum occurs between the date of the judgment and the date of actual payment, the debtor is obliged to pay an additional amount corresponding to the difference between the rate of exchange at the date of the judgment and the date of actual payment.
2. The provisions of paragraphs 2 and 3 of Article 4 shall apply *mutatis mutandis*.

### Article 8

The place of payment referred to in the preceding Articles shall be the place where payment is due.

### Article 9

For the application of the preceding Articles the rate of exchange shall be that intended by the parties, or, failing such intention, that which may enable the creditor to procure the sum due without delay. Usages shall be taken into account.

*Id.*, Annex. Europ. T.S. No. 60. The Convention was signed by Austria, France, West Germany and Luxembourg in 1967 but never ratified by any party. 2 COUNCIL OF EUROPE,

*Wadsworth v. Lydall*,<sup>252</sup> a Court of Appeal case in which a party to a contract was held entitled to special damages of interest and costs of obtaining a substitute mortgage where the other party to the contract had failed to pay money for the delivery of title to land when due. Although the *Wadsworth* case did not involve a foreign currency liability, the case of *Ozalid Group (Export) Ltd. v. African Continental Bank Ltd.*,<sup>253</sup> presented the problem in the foreign currency context when it addressed the question of compensation for late payment. The failure of the debtor to make timely payment of money due under a contract meant that the creditors suffered from a decline in the value of the dollar against the pound between the due date and the date of actual payment. The court found the loss to be foreseeable and held the creditors entitled to compensation.<sup>254</sup>

Both the foreign currency liability exception to the *Loudon* rule in the United States and the *Ozalid Group* gloss on judicial commentary in England represent a maturation of the application of Anglo-American legal principles rooted in *Hadley v. Baxendale*.<sup>255</sup> There it was stated that damages recoverable for breach of contract must be:

such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.<sup>256</sup>

Although the principle of nominalism remains well-entrenched in Anglo-American law when a forum currency transaction is involved,<sup>257</sup> the complexities of multiple-currency transactions make its application inappropriate. Allowing damages for losses arising from post-breach exchange rate fluctuation is consistent with the development of the *Loudon* rule in the United States and the similar rule in England.<sup>258</sup> Today it is

EUROPEAN CONVENTIONS AND AGREEMENTS 316 (1972). "It did not become effective, because most countries did not need it and Britain stood aloof until the events of 1975 made it there largely superfluous." F. MANN, *supra* note 11, at 351.

252. [1981] 1 W.L.R. 598 (C.A.).

253. [1979] 2 Lloyd's L.R. 231 (Q.B.).

254. *Id.* at 233.

255. 156 Eng. Rep. 145 (1854).

256. *Id.* at 151.

257. 11 S. WILLISTON, *supra* note 245, § 1410A. See, e.g., *Meinrath v. Singer Co.*, 87 F.R.D. 422, 426-27 (S.D.N.Y. 1980).

258. See F. MANN, *supra* note 11, at 348:

If the foreign currency depreciates in terms of sterling the law [of England] as it now stands allows the creditor to recover the amount of foreign currency he is entitled to and does not attempt to compensate him for the loss which he suffers as a result of the debtor's default in discharging his obligations. The consequences of that default have to be decided upon, not by the law of procedure which is concerned with the enforcement rather

## Foreign Currency Judgments

difficult, if not impossible, to assume that the possibility of loss as a result of exchange rate fluctuation occurring after a breach of contract or commission of a tort is not foreseeable. Even if this argument could have been made in the past, since the end of fixed exchange rates in 1971,<sup>259</sup> the fluctuation of rates has become an everyday fact of life in international commerce. Particularly in the contract setting, where the parties have already dealt with explicit allocation of the risk of exchange rate fluctuation for the duration of the contract by selecting a currency of payment, it would be absurd to argue that the parties did not foresee that the risk of exchange rate fluctuation would continue upon breach. Neither is it fair to assume that, had the matter been negotiated, the risk of post-breach fluctuation would have been allocated the same as it was prior to the negotiated performance date.

Finally, subsection (4) is directed at the problem of matching the interest rate to the currency of judgment. Without such a rule, it is possible that a court would render judgment in one currency and apply the interest rate relevant to another currency at either the pre-judgment stage, the post-judgment stage, or both. The result would be inappropriate in a world in which international commerce has become a part of everyday life for so many.

## VI. Conclusion

Those who participate in transnational transactions are faced with increasingly complex problems. The judicial system should not impose additional burdens on these transactions. The traditional judicial response to liabilities expressed in a foreign currency has created legal rules no longer supported by a justifiable rationale. The British, through the developments leading up to and later expounding upon the House of Lords decision in *Miliangos* have provided us with a thoughtful example for the development of American law. Using this blueprint with caution allows us to develop a rational response to today's commercial world which avoids the corruption of the traditional home currency judgment conversion date rules.

than the creation of rights, but by the proper law of the contract or the substantive law governing the particular obligation under consideration. Where the applicable law is English it is, therefore, most important in the interest of justice and in accordance with suggestions made earlier in this book to develop a sound rule permitting the recovery of damages for the loss caused by the depreciation of foreign money—a rule such as many foreign countries have evolved and which, it is submitted, is or ought to be concomitant to the modern English law.

259. See *supra* note 1.

Section 823 of the Revised Restatement moves in the right direction. It recognizes that U.S. courts can give judgment in a foreign currency. However, it retains the baggage of the awkward and easily manipulated home currency judgment conversion date rules. U.S. courts have traditionally recognized indirectly that loss resulting from currency exchange rate fluctuation following a tort or breach of contract is compensable but have done so through inconsistent application of the existing set of rules. The inclusion of a Restatement section which for the first time deals with the issue of judgment on foreign currency liabilities provides an opportunity for clear leadership in legal development. This opportunity should not be wasted. A new rule should recognize and deal with all the problems inherent in the existing system, as well as provide a framework compatible with current commercial practice.

The Draft Revised Restatement provision acknowledges that the first step of recognizing that U.S. courts can grant judgment in a foreign currency is both a possible and desirable adjustment of the U.S. rule. It has not, however, dealt adequately with the traditional problems encountered by U.S. courts in dealing with the precedential availability of only the breach date and judgment date exchange rates when a judgment on a foreign currency liability is expressed in U.S. dollars. This step requires recognition that compensation for post-injury exchange rate fluctuation is reasonably foreseeable, and therefore compensable under traditional theories of damages, and has traditionally been awarded, albeit in a roundabout way through the contortion of the breach date/judgment date analysis. If we are going to rid ourselves of the problems of the procedural home currency judgment requirement, we should at the same time avail ourselves of the opportunity to leave behind the problems of the substantive breach date/judgment date straitjacket.

Once we recognize that the law does not require that a judgment be rendered in U.S. currency when a foreign currency better expresses the damages involved, we should provide for judgment in the appropriate currency, whether foreign or domestic, and award consequential damages for any additional loss resulting from exchange rate fluctuation. Doing so will avoid the problems of using currency conversion and choice of law rules which were developed to indirectly provide compensation for foreseeable consequential damages at a time when it was assumed that foreign currency judgments were not available. This will not create different results in the cases. It will merely allow courts to express their rationale in a straightforward and honest fashion.